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REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
Supreme Court of Judicature  
OF THE  
STATE OF INDIANA,  
WITH TABLES OF CASES REPORTED AND CITED, AND STAT-  
UTES CITED AND CONSTRUED, AND AN INDEX.

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CHARLES F. REMY,  
OFFICIAL REPORTER.  
JOHN W. DONAKER, Assistant Reporter .

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VOL. 157,

CONTAINING CASES DECIDED AT THE MAY TERM, 1901, AND NOT RE-  
PORTED IN VOLUME 156, AND CASES DECIDED AT  
THE NOVEMBER TERM, 1901.

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JUDGES

OF THE

SUPREME COURT

OF THE

STATE OF INDIANA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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HON. LEANDER J. MONKS. \* ‡  
HON. JAMES H. JORDAN. || ‡  
HON. JOHN V. HADLEY. †  
HON. FRANCIS E. BAKER. †  
HON. ALEXANDER DOWLING. †

\* Chief Justice at May Term, 1901.

|| Chief Justice at November Term, 1901.

† Term of office commenced January 1, 1899.

‡ Term of office commenced January 1, 1901.

OFFICERS  
OF THE  
SUPREME COURT.

ATTORNEY-GENERAL,  
WILLIAM L. TAYLOR

REPORTER,  
CHARLES F. REMY.

CLERK,  
ROBERT A. BROWN.

SHERIFF,  
GEORGE W. WEIR.

LIBRARIAN,  
HOYT N. McCLAIN.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**Supreme Court of Judicature**  
**OF THE**  
**STATE OF INDIANA,**  
**AT INDIANAPOLIS, MAY TERM, 1901, AND NOVEMBER TERM,**  
**1901, IN THE EIGHTY-FIFTH AND EIGHTY-SIXTH**  
**YEARS OF THE STATE.**

**BERKSHIRE v. CALEY ET AL.**

[No. 19,180. Filed May 28, 1901.]

**APPEAL AND ERROR.**—*Failure of Appellee to File Brief.*—Where the appellee fails to file a brief within the time allowed in support of the judgment, such failure may be accepted and deemed to be a confession of the errors assigned by the appellant, and the Supreme Court, in the exercise of its discretion, may reverse the judgment without considering the appeal on its merits. *p. 5.*

**PARENT AND CHILD.**—*Custody of Child.—Guardian and Ward.—Habeas Corpus.*—The rule of common law recognized by §2682 Burns 1894 giving the father the *prima facie* right to the custody of his minor child is not absolute, but is secondary and subordinate to the welfare and happiness of the child. *pp. 5-9.*

**EVIDENCE.**—*Habeas Corpus.—Parent and Child.—Guardian and Ward.*—In a *habeas corpus* proceeding by a father to obtain the custody of his child, it was proper for the court to hear evidence in respect to the fitness and character of the woman in whose care the guardian expected to place the child. *p. 10.*

**SAME.**—*Habeas Corpus.—Parent and Child.—Guardian and Ward.*—In a *habeas corpus* proceeding by a father for the possession of his child, the court properly refused to permit plaintiff to attack the character of the daughter of the woman in whose care the guardian intended to place the child. *p. 10.*

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Berkshire v. Caley.

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From White Circuit Court; *Truman F. Palmer*, Judge.

*Habeas corpus* by Solomon M. Berkshire against James W. Caley and others to obtain the custody of plaintiff's minor child. From a judgment in favor of defendants, plaintiff appeals. *Affirmed.*

*A. W. Reynolds* and *A. K. Sills*, for appellant.

JORDAN, J.—This was a proceeding of *habeas corpus* instituted by appellant, Solomon M. Berkshire, against James W., Edward W., and Augusta Caley, to obtain the custody of his daughter, Nora B. Berkshire. It appears that of the defendants, appellees herein, James W. Caley is the grandfather, Edward W., is the uncle, and Augusta Caley is the aunt by marriage, of the child in controversy.

Appellant avers in his petition that Nora B. is his child; that she is past the age of nine years, and that he is lawfully entitled to her custody; that said defendants have seized her body and restrained her of her liberty and deprived him of the custody or possession of said Nora B., by forcibly keeping her in their possession in White county, Indiana, and that such restraint is unlawful and without right. The writ was awarded and made returnable on August 24, 1899. On that date the defendants appeared and made returns to the writ. Edward W. and Augusta Caley upon their part, for return thereto, alleged and set forth that they neither jointly nor separately at the commencement of the action or at the time of their return to the writ had the custody or control of the said Nora B. Berkshire, and in no manner did they deprive her of her liberty. The defendant, James W. Caley, for return, alleged and represented to the court that he had the body of said Nora B. before it, but he averred that it was not true that he restrained her of her liberty as charged by the petitioner, but alleged the facts to be that said child remained with him as a part of his family of her own free will and choice; that

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Berkshire v. Caley.

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he, before the institution of this action, was, by the clerk of the White Circuit Court, duly appointed her guardian, she being a minor of the age of nine years; that said Nora B. is the daughter of the plaintiff and Nettie B. Berkshire, who were formerly husband and wife, the latter being his daughter; that about October 10, 1897, plaintiff in the Cass Circuit Court procured a decree of divorce from his said wife, Nettie B., and that by an agreement between said parties the latter was to have and retain the custody of their said infant daughter, Nora B.; that her said mother took and retained the custody and possession of the said child until August 19, 1899, when the said Nettie B. Berkshire died; that on her deathbed she gave to the defendant the care and custody of said Nora B., and requested that he, with the aid of his codefendants Edward W., and Augusta Caley, care for, raise, and protect her said child; that said Nettie B., being aware of the cruel and malignant disposition and character of the plaintiff, requested and pleaded that said child should not be given into his care or custody; that after plaintiff and his wife were divorced, the former did not visit his said child until after the death of her mother; that after obtaining the divorce heretofore mentioned, the plaintiff married a widow who had minor children by her former marriage, all of which children resided with plaintiff as members of his family, and if the custody of Nora B. is awarded to him she will be required to live with him and her stepmother and her said children by the former marriage, which defendant avers, under the circumstances, will be detrimental to the best interests of said Nora B. The defendant further avers that he has a good farm and a good house thereon and is amply able to care for and properly raise and protect said child, who is very much attached to him and his family, and who refuses to go to live with her said father, and that the latter is not situated or in the condition to give her the advantages which she will enjoy if left with the defendant, and it is further

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Berkshire v. Caley.

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alleged and charged that the petitioner is not a fit or suitable person to have the custody and control of said child.

After unsuccessfully moving to make this return more specific, appellant filed his answer thereto, whereby he admitted the fact of the divorce from the mother of the child, that the custody of the latter had been transferred to its said mother by means of an agreement, as averred in the return, and that she retained the same until her death, but he denied or controverted the charge made against his character and fitness, and alleged that his present wife is a moral and Christian woman, and that his condition and means are such that if the said Nora B. is placed in his care and custody she will secure good attention and moral and physical training, and the advantages of a good education, which she can not secure if she remains in the custody of the defendant; that the defendant, James W. Caley, is a man who has no wife; that he uses profane language in the presence of his family, and also uses intoxicating liquors; that he has taken said Nora B. Berkshire to places where intoxicating liquors were drank, and that he is not a fit or suitable person to have the care and custody of said child.

Upon the issues joined between the parties, the court heard the evidence, and thereupon found in favor of the defendants, and, over appellant's motion for a new trial, adjudged that he take nothing by his action and that he pay the costs of the suit, and further adjudged that Nora B. Berkshire, the girl in controversy remain in the custody of the defendant James W. Caley. The petition proceeds upon the theory that appellant as the father of the girl is entitled to have the custody and control of her, and that she is illegally held by the defendants and thereby restrained of her liberty. The principal contention of counsel for appellant is that the latter is shown by the evidence to be a suitable person to have the custody of his child and that the court erred in denying him this right. Each party examined numerous witnesses in the lower court and a great mass of



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evidence has been certified in this appeal, all of which we have read and considered together with the questions presented by appellant. The appellee has not favored us with a brief or any argument whatever to sustain the judgment below, and we are left wholly unaided, so far as he is concerned, to examine and consider the authorities and argument presented by counsel for appellant. This neglect is to be regretted, and meets our positive disapproval. Where a successful party in the lower court, when the case has been appealed by his adversary to this court, becomes so indifferent or derelict as to fail to prepare and file within the time allowed a brief or argument in support of the judgment assailed, such failure or default upon his part may be accepted and deemed to be a confession of the errors assigned by appellant, and this court, in the exercise of its discretion, may reverse the judgment without considering the appeal on its merits. We do not in this appeal enforce the rule here declared, but parties should be admonished in respect to its enforcement in the future and govern themselves accordingly.

The evidence when considered as a whole does not favorably impress us in respect to appellant's fitness to have the custody, control, and education of his said child; neither is it shown that her custody should have been awarded to him by the court upon the grounds that it would conduce to her future welfare or best interests. In fact the evidence in respect to the fitness of the parties to have the custody and care of the child in dispute may be said to preponderate in favor of the appellee James W. Caley. It appears that the girl at the time of the trial was nine years old and over, and that appellant and his wife, her mother, were divorced in 1897. They had two children,—said Nora B., then about seven years of age and a boy still younger. By a written agreement, into which the parties entered at the time of the divorce, they divided the property which they had between them, and further provided that the mother

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should have the custody of this girl, and the father retain the custody and control of the boy. The wife, after she was divorced from appellant, took her said daughter and went to live in the home of her father, James W. Caley, where she and her daughter both resided as members of his family until the death of the mother, which occurred in August, 1899. The mother upon her deathbed requested that her said daughter, Nora B., should remain with the grandfather, and that her brother Edward and her aunt, Augusta Caley, should aid him in caring for her said daughter. The grandfather is shown to be about fifty-three years old, and since the death of the mother of Nora B., he has been appointed the guardian of his said granddaughter by the clerk of the White Circuit Court. It is disclosed that the wife of James W. Caley died a short time before the death of Nora's mother, and that appellee, at the time of the trial, was a widower; that under an arrangement which he made with his co-appellee, Augusta Caley, he was intending to reside in her family, she being his sister-in-law, and had also arranged to place his said ward and granddaughter under her care. The evidence shows that Augusta Caley is an excellent woman and suitable to have the care and control of this girl. The grandfather is the owner of a farm, as well as other property, and both he and Augusta Caley, Nora's aunt, are very much attached to her, and in return the latter is shown to be very much attached to them. Nora B. Berkshire, while upon the witness stand testifying as a witness, expressed a strong desire to remain with her grandfather and aunt. She admitted that she loved her father and liked to go and visit him, but that her preference was to remain and live with her said grandfather and aunt. It is disclosed by the evidence that appellant is addicted to the use of intoxicating liquors and has contracted the vicious habit of profanity. He is in the habit of using profane language in the presence of ladies and in the presence of his own wife and family. It is disclosed that upon one

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occasion after his divorce while reproving his said daughter, Nora B., and her little brother for having mislaid a bridle with which they were playing, he employed profane language in reproving them. It is further disclosed that the relations existing between appellant and his father-in-law's family after he was divorced from the mother of his said daughter were not altogether amicable; that he seldom, if ever, visited his child during the time that she lived at the home of her grandfather, and did nothing, comparatively, towards furnishing her any support. After the death of the mother appellant was heard to say that he intended to have the control of this child and also the money or property which she seems to have inherited upon the death of her mother. On the very day that his divorced wife was buried, he went to the home of James W. Caley and demanded that he be given the possession of Nora. It would seem from a consideration of the evidence that he was actuated to demand and claim the custody of his daughter more on account of the ill will which he entertained towards his father-in-law, than he was by the desire to promote her welfare and best interest.

As a general rule there can be no question but what the father, *prima facie*, is entitled to the custody of his legitimate minor children, but this right is not an absolute one, but depends upon the circumstances in each particular case, and the question of the custody, control, and education of a minor child, when involved, is, under the facts in the case, lodged in the sound discretion of the trial court, subject, of course, to review upon appeal to a higher court. *Darnall v. Mullikin*, 8 Ind. 152; *Child v. Dodd*, 51 Ind. 484; *McKenzie v. State, ex rel.*, 80 Ind. 547; *McGlennan v. Margowski*, 90 Ind. 150; *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309.

Our statute, §2682 Burns 1894, relating to the custody of minors upon the part of their guardians and parents, provides: "Every guardian so appointed shall have the

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custody and tuition of such minor, and the management of such minor's estate during minority, \* \* \* . Provided, That the father of such minor (or if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control of the education of such minor." This provision is but a recognition of the rule asserted at common law, and appellant, under the circumstances, in view of the fact that he was the father of the minor in controversy, presented, at least, a *prima facie* claim or right to be awarded the custody thereof as against appellee, her legal guardian. It then became a question, however, as to whether appellant was a suitable person to resume the custody and control, which, under his agreement, he had, prior to the death of his divorced wife, transferred to her, and also as to whether it would promote the best interests or general welfare of the child to change her custody by awarding it to appellant. *Garner v. Gordon*, 41 Ind. 92; *State v. Banks*, 25 Ind. 495; *Bryan v. Lyon*, 104 Ind. 227; *Hussey v. Whiting*, 145 Ind. 580; *Schleuter v. Canatsy*, 148 Ind. 384.

While the legal rights of a father to have the custody of his minor child should be respected by a court, still the general welfare or best interest of the infant is paramount in consideration and is of controlling influence, and the rights of the parents must be considered as secondary or subordinate to the welfare of the child. *Jones v. Darnall*, 103 Ind. 569; *Bryan v. Lyon*, 104 Ind. 227; *Hussey v. Whiting*, 145 Ind. 580; *Hurd on Habeas Corpus*, 461.

The tendency of the modern decisions of our courts has been to affirm that the father's right to the custody of his minor child is not absolute, but that it is secondary or subordinate to the welfare and happiness of the child, and that such welfare is the paramount or controlling question to be determined in providing for the infant's custody and control. Neither of the parents of the minor, in the eye of the law, can have such an interest in their child as will be

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allowed to conflict with its future welfare. In the case at bar there is evidence to establish that appellant is not a suitable person to be awarded the custody and care of this young girl. Again, it is disclosed that when the conjugal relations existing between him and her mother were severed by the decree in the divorce proceedings, that he voluntarily transferred her custody and care to the mother; that the latter with her said daughter was given a home under the roof of her father, where she resided until her death. During this period, it appears that the attachments of the grandfather and the granddaughter for each other have been greatly increased and are of such a nature that apparently a change of her custody or separation from him would affect her future happiness. She, as it appears from the intelligent manner in which she gave her evidence as a witness on the trial of the cause, is, apparently, at least, capable of expressing her own wishes or desires as to which of the parties she preferred should have her in charge, and the court, it seems, consulted her in respect to her wishes, and, as previously stated, she expressed her desire to remain with her grandfather and her aunt, Augusta. The wishes or desires of an infant of discretion in respect to his or her custody are frequently considered by the trial court, not because such infant has the legal right to demand that his wishes be regarded, but because it is proper for the court to be informed relative thereto, in order that it may be better prepared wisely to exercise its discretion upon the question of the custody of such infant. The court, however, is not to be influenced in any degree by the mere whims of the infant, but may have regard for its feelings, attachments, and reasonable preferments, and its probable contentment and happiness, incidental to its custody. *Hurd on Habeas Corpus*, 532, 533.

As there is evidence which fully justified the court in refusing to disturb the present custody and control of the child in controversy, we cannot hold that the court by such

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refusal abused its discretion. Appellant complains because the court heard evidence in respect to the fitness and character of Augusta Caley to have the care of the child in question. Appellant was not harmed by this ruling. It appeared, as heretofore stated, that the appellee had arranged to place his ward in the care of this lady, hence, it was proper for the court to inquire in regard to her fitness. In the introduction of evidence in cases of this character the court may allow a wide range, as the question to be determined rests within its sound discretion. *McKenzie v. State, ex rel.*, 80 Ind. 547.

The court refused to allow appellant, upon the trial, to attack the character of the daughter of Augusta Caley. There is no error in this ruling, as the character of the daughter of Mrs. Caley was in no manner involved in the case.

We have considered all of the questions argued by appellant, and conclude that the record presents no reversible error. The trial court, by its judgment, did not decide for what period of time the child in dispute should remain in the custody and control of appellee, nor for what time appellant should be deprived of her custody, and if the conditions or character of the parties in the future should be changed, appellant may then be in a position successfully to demand the custody of his said daughter.

Judgment affirmed.

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NATIONAL STATE BANK v. SANDFORD FORK & TOOL  
COMPANY ET AL.

[No. 19,253. Filed May 28, 1901.]

APPEAL AND ERROR.—*Special Finding.—Evidence.*—A finding will not be disturbed on the evidence where there is any evidence which, when considered alone, is sufficient to sustain it. *p. 15.*

SAME.—*Conclusions of Law.—Exception.*—An exception to the conclusions of law concedes that the facts upon which the conclusions were based are correctly found. *p. 15.*

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**CORPORATIONS.—Mortgages.—Execution by President.**—Where the directors of a corporation specifically instructed the president to manage the finances and prudential affairs of the company according to his best judgment, and to execute any contract or instrument deemed by him necessary or prudent in the conduct of the company's affairs, and thereafter acquiesced in all the things performed by him under such instruction, such action was as effectual in authorizing the president to execute a mortgage as the formal adoption and entry upon the minutes of the corporation of a resolution to that effect. *pp. 15-17.*

**SAME.—Mortgages.—Execution by President.**—Under §5054 Burns 1894 the board of directors of a corporation may authorize the president of such corporation to execute a mortgage at a regular meeting of the board of directors, or by their separate assent, or by any other mode of doing such acts by individuals. *p. 17.*

**CHATTEL MORTGAGES.—Failure to Record.—Fraud.**—A chattel mortgage will not be held fraudulent as to creditors because it was withheld from record for four months, the mortgagor reexecuting it at substantially ten-day periods, the last mortgage being placed on record, where the mortgages were omitted from record because of the promise of the mortgagor to pay the same and repeated in each period of ten days, and there was no agreement between the parties to withhold same from record. *pp. 17-19.*

From Vigo Circuit Court; *James E. Piety*, Judge.

Action by National State Bank of Terre Haute against Sanford Fork & Tool Company and others to set aside mortgages as fraudulent against creditors. From a judgment in favor of defendants, plaintiff appeals. *Affirmed.*

*F. A. McNutt, J. G. McNutt and E. F. Williams*, for appellant.

*S. B. Davis and S. R. Hamill*, for appellees.

**HADLEY, J.**—This controversy is over a fund of \$19,000 which resulted from the agreed sale of goods alleged to have been mortgaged by the appellee Sandford Fork & Tool Company to the appellee Vigo County National Bank. This is the second appeal, *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352. There are two mortgages, between them covering all the personal goods of the tool company, and each purporting to secure an indebtedness aggregating \$28,000. The validity of these two mortgages is the only

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question presented, and it arises under an exception to the conclusions of law. The material facts exhibited by the special finding follow: The appellee Sandford Fork & Tool Company is a corporation organized under the laws of this State, and was doing a manufacturing business in the city of Terre Haute. Appellant and appellee bank were and are doing a general banking business in the same city. September 27, 1887, Robert Nixon was elected president of the tool company, and on February 4, 1890, Willard Kidder, who was at the time vice-president of appellee bank, was elected, and succeeded Nixon as president and continued in said office till the commencement of this suit. The finances and prudential affairs of the tool company from the election of Nixon as president in September, 1887, continuously to the commencement of this suit were managed and conducted through and by the president of said company, who was at all times held out to the public by the board of directors as the chief executive officer thereof, and during all of said time the president made the contracts for the company, executed notes, drew checks, and signed whatever instruments were necessary to be signed to borrow money and carry on the business of the company, all of which acts were acceded to and acquiesced in by the board of directors; and when Kidder was elected president, February 4, 1890, the board of directors instructed him to manage the finances and prudential affairs of the company according to his best judgment, and to execute all papers and instruments deemed necessary thereto, which instruction Kidder carried out to the full approval and acquiescence of the board of directors. No order or resolution of the board of directors affecting the powers and duties of the president was entered of record in the minute books of the corporation, but a by-law provided that "all the instruments obligating the company shall be signed by the president and attested by the secretary;" on November 14, 1889, the tool company was indebted to appellee Vigo County National Bank by divers notes amount-



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ing to \$43,000. Hudnut, president of the bank, had been instructed by his board of directors to demand security for a part of such indebtedness; on the date last named, upon his demand, the tool company, by Nixon, its president, attested by its secretary, executed to the bank two mortgages, one covering all and the other a part of the personal goods of the company, and both securing two notes, one for \$12,000 and one for \$15,000. At the time of the execution of these mortgages it was agreed that the same should be withheld from record until the last of the ten days allowed by law for recording the same. On the same day (November 14th) Hudnut, president of the appellee bank, loaned the tool company upon its note \$3,000 of its individual funds, and neither demanded, nor received, then, nor subsequently, any security, or payment thereon, except the dividend paid by the receiver afterwards appointed. On December 13, 1889, appellee bank loaned the tool company \$2,500, and again, on January 31, 1890, loaned it \$2,500, on the company's unsecured notes, and on the last named date the further sum of \$6,000, on its note secured by shares of its capital stock of the face value of \$7,500, which said three notes are still unpaid except the dividend paid thereon by the receiver; that between the dates of November 14, 1889, and March 27, 1890, appellee bank continued to trust and give credit to the tool company, and within that period discounted its commercial paper and acceptances to the amount of \$26,000; that after Kidder was elected president (February 4, 1890,) to the commencement of this suit, in conducting the business of the tool company, he received and disbursed on behalf of the company \$60,000, \$30,000 of which he paid out for labor and supplies, and \$30,000 on the unsecured indebtedness of the company, no part of which was paid on the indebtedness secured by the mortgages in controversy; that from and after November 14, 1889, to the commencement of this action, the tool company was in embarrassed circumstances and was unable to meet all its demands and obliga-

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tions as the same fell due; that the managing officers and directors of the tool company, and the president and directors of appellee bank, during all the time running from November 14, 1889, to the commencement of this suit, believed that said company was solvent and that it would continue to be a going concern and would be able to pay all its obligations in full; on and in the time intervening between November 14, 1889, and April 25, 1890, the original two mortgages were reexecuted between the same parties fifteen times at substantially ten days' periods, on about the same property and to secure the same indebtedness, except that on March 18, 1890, the mortgage note for \$15,000 was paid, and the indebtedness amounting to \$16,000 remaining unsecured November 14, 1889, and which had been extended by renewals, was introduced into and secured by the mortgages executed on March 27, 1890; there was no agreement between the parties when the first mortgages were executed, and none at any time prior or subsequent thereto, that said mortgages should be renewed every ten days; none of the mortgages executed prior to April 25, 1890, were recorded, but the two executed upon the last named date were duly recorded in the recorder's office of the county on May 3, 1890. The mortgaged property and its locations were specifically described in the several mortgages; it was left in the possession of the mortgagor, and was not labeled, or particularly set aside to the mortgagee, but was left in the same places where located at the time of the first mortgages, except 1,700 dozen finished forks and hoes, described only in the first mortgages, were removed to another warehouse; without the knowledge or consent of the mortgagee the mortgagor filled some orders out of the finished mortgaged product and manufactured some of the mortgaged raw material, but in each instance restored what was taken away with goods of like kind and value; the mortgages in controversy were executed in good faith to secure a *bona fide* indebtedness therein described, and without any fraudulent

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intent to cheat, hinder, or delay any creditor of the tool company. After November 14, 1889, and before the commencement of this suit, the tool company became indebted to appellant for money loaned in the sum of \$18,552.

Upon these facts the court below found the law to be with appellee bank, that the mortgages executed to it by the tool company on April 25, 1890, are valid and subsisting mortgages, and that the fund derived from the agreed sale of the mortgaged property now in the hands of a trustee should be turned over to said appellee to be applied upon the indebtedness secured thereby.

Appellant's counsel argue, in a general way, that the special findings are not sustained by the evidence, but they fail to point out any fact stated in the findings that has no evidence in its support. It is, in substance, admitted that there is a conflict in the evidence upon all material matters, and a conflict is sufficient to preclude this court from a consideration of the question. The rule is firmly settled that where there is evidence for and against a proposition, this court will not undertake to weigh it—that must be done by the lower court, who is in a situation to be the more accurate judge—and when a verdict or finding has any evidence in its support, which, when considered alone is sufficient to sustain it, this court will not disturb it. *Schmidt v. Zahrndt*, 148 Ind. 447; *Sweeney Co. v. Fry*, 151 Ind. 178. For the purpose of this decision, then, we must regard the special finding as exhibiting the absolute truth; and the whole truth with respect to the facts of the case. Appellant's exception to the conclusions of law concedes that the facts are correctly found. *Phelps v. Smith*, 116 Ind. 387, 393.

Appellant insists, first, that, in the absence of a specific authority from the board of directors, the president of the tool company had no power to execute the mortgages in controversy, and that they are therefore void. It is true the findings show that there was no resolution of the board, and

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no verbal warrant specifically authorizing the execution of the mortgages, but it is shown that for years before the mortgages were made the president acted as the chief executive officer of the company, and executed all notes, checks, contracts, and instruments in writing necessary to be executed in conducting the business of the company, and that during all the time the directors held the president out to the public as such executive officer and acquiesced in all of his acts as such; and furthermore it appears that when Kidder was elected and installed as president, on February 4, 1890, he was specifically instructed by the board of directors to manage the finances and prudential affairs of the company according to his best judgment, and to execute any contract or instrument deemed by him necessary, or prudent, in the conduct of the company's affairs; and that the directors subsequently ratified, and acquiesced in, all the things performed by him under such instructions.

This course of conduct by the directors was as effectual in authorizing the president to execute the mortgages as the formal adoption and entry upon the minutes of the corporation of a resolution to that effect. It was said by this court in this case on its former appeal, *National State Bank v. Vigo Nat. Bank*, 141 Ind. 352, at p. 355. "The board of directors may invest him [the president] with authority to act as the chief executive officer of the company; this may be done by resolution or by acquiescence in the course of dealing and manner of transacting the business of the corporation. \* \* \* When a contract is made in the name of a corporation by the president, in the usual course of business, which the directors have the power to authorize him to make, or to ratify after it is made, the presumption is that the contract is binding on the corporation until it is shown that the same was not authorized or ratified." See authorities cited in case referred to.

In this case the authority of Kidder, as president, to make the mortgages, does not rest upon the usual course of

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business, nor the ratification or acquiescence of the board, but it had behind it the express authority of the board, though verbally given, in the form of an instruction, to execute any sort of contract or instrument deemed by him wise in the exercise of his best judgment. This authority the board had the power to confer. §5054 Burns 1894, §3854 R. S. 1881 and Horner 1897; *National State Bank v. Vigo Nat. Bank*, 141 Ind. 352, 355. And it was conferable at a regular meeting of the board of directors, or by their separate assent, or by any other mode of doing such acts by individuals. *Richardson v. St. Joseph Iron Co.*, 5 Blackf. 146, 33 Am. Dec. 460; *Hamilton v. Newcastle, etc., R. Co.*, 9 Ind. 359; 17 Am. & Eng. Ency. of Law, 55, and cases there collated.

It is further contended that the withholding of the several mortgages from record from time to time for five months is fraudulent *per se* as to appellant, who extended the tool company credit for the full amount of its claim during the pendency of the unrecorded mortgages without knowledge of their existence, and that the finding of the court that the same were withheld from record without any previous agreement to do so, and without any fraudulent intent, should be disregarded.

The withholding of a valid mortgage from the public records until it loses its force as a preference can of itself injure no third person; neither can the reëxecution of such a mortgage, any number of times, be harmful if such original and renewal executions are made in good faith and without any agreement or understanding that the same shall be done; that is to say, if each instance of the execution and withholding of a mortgage from record until it becomes ineffectual by lapse of time is independent of every other similar transaction, is *bona fide*, and rests upon its own facts without being influenced by any prior, or intended to influence any subsequent, act of like character, the law neither condemns nor imputes fraud.

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It is the keeping of a mortgage or other preference, executed by an insolvent debtor, concealed, and from the public records under an agreement or understanding to do so for some definite period, or until the happening of some contingency, and for the purpose, or which has the effect of giving the debtor a fictitious financial standing, that the law denounces. In such cases the preference will be set aside in favor of those who are misled thereby into giving credit to the debtor under the belief that such preference did not exist. *Hutchinson v. First Nat. Bank*, 133 Ind. 271, 286, 36 Am. St. 537; *American, etc., Bank v. McGettigan*, 152 Ind. 582, 588, 71 Am. St. 345; *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Walton v. First Nat. Bank*, 13 Col. 265, 22 Pac. 440, 16 Am. St. 200, 5 L. R. A. 765; *Folsom v. Clemence*, 111 Mass. 273; *Stewart v. Hopkins*, 30 Ohio St. 502, 529.

In this case it is expressly found as a fact that there was neither an agreement nor fraudulent intent. Conceding what appellant claims, that the finding of good faith should be disregarded, and his contention is still without foundation. The absence of such finding would not enable us to say as a matter of law that the failure to record the several mortgages was fraudulent as to creditors. Under our statute, §6649 Burns 1894, §4924 R. S. 1881, and Horner 1897, the question of fraud is one of fact, and where fraud is essential to a cause of action it must be found as a fact in a special finding and not left to be inferred as a matter of law. *Phelps v. Smith*, 116 Ind. 387; *Hawkins v. Fourth Nat. Bank*, 150 Ind. 117, 124; *Fulp v. Beaver*, 136 Ind. 319; *Morgan v. Worden*, 145 Ind. 600; *Hutchinson v. First Nat. Bank*, 133 Ind. 271.

It was said in the Hutchinson case at page 286: "In none of the cases cited by counsel has the mere failure to record an instrument within the time fixed by statute, whether such failure was in pursuance of a previous contract, or by mere neglect, been held sufficient, of itself to avoid such instru-

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ment. \* \* \* We are satisfied that an arrangement for the withholding of a mortgage from record is not of itself sufficient to justify a court in holding, as a matter of law, such mortgage fraudulent and void as to creditors, either existing or subsequent."

If the fact was as testified by Mr. Hudnut, that the recording of the several mortgages was omitted by his reliance upon the promises of the officers of the tool company, repeated in each period of ten days, that the debt should be paid within the particular period, and the failure to record was solely the result of grace and confidence, the act merits neither legal nor moral condemnation. And such is the legal effect of the findings.

Appellant also argues that the two mortgages executed on November 14th, the two executed on April 25th following, and all those intervening, constituted in fact but two continuing instruments from the first date, and are void as to third persons for omission of registry under §6638 Burns 1894, §4913 R. S. 1881 and Horner 1897. The findings do not support the argument. They disclose no such intent. They show that from first to last there were some changes made in the mortgaged property, and some in the indebtedness secured; that from November 14th to April 25th, the periods between the making of mortgages exceeded ten days at least four times, running from eleven to twenty-one days; that on April 25th the mortgages in suit were executed, and recorded on May 3rd as prescribed by the statute. No other mortgages were recorded. No claim is made under any other, and if the parties saw fit to treat all previous instruments as void, and of no effect, in the absence of fraud, the law will not interfere.

The further contention that the findings show a secret trust is not maintainable for reasons already indicated.

We find no error in the record. Judgment affirmed.

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**MENAUGH, ADMINISTRATRIX, v. BEDFORD BELT RAILWAY COMPANY ET AL.**

[No. 19,259. Filed May 28, 1901.]

**CARRIERS.—*Freight Train.—Passenger.—Railroads.***—In an action for personal injury resulting in death, the evidence showed that defendant was operating a short line of railroad to a stone quarry; that decedent boarded a coach attached to a train of cars loaded with stone, without direction or invitation, and after riding a short distance the conductor requested him to get on the car behind the engine, as he desired to leave the coach on the side-track. No fare was demanded, and there was no evidence that decedent presented himself as a passenger or that defendant ever accepted passengers on such train. *Held*, that decedent was not a passenger. *pp. 21-24.*

**NEGLIGENCE.—*Railroads.—Directing Verdict.—Contributory Negligence.***—In an action against a railroad company for personal injury resulting in death, the evidence showed that decedent boarded a coach attached to a train of cars loaded with stone, without direction or invitation, and after riding about three-quarters of a mile the conductor requested him to get on the car immediately behind the engine, as he desired to leave the coach on the side-track, whereupon the deceased took a seat on the tool-box attached to the rear of the tender to avoid the cinders, and the engine and tender left the track, causing death of decedent. *Held*, that the decedent was guilty of contributory negligence and that the court properly instructed the jury to return a verdict for defendant. *pp. 23, 24.*

**TRIAL.—*Evidence.—Objection.—Exception.***—In order to save an exception to the exclusion of testimony, the offer to prove must be made before the objection is sustained. *pp. 24, 25.*

From Lawrence Circuit Court; *W. H. Martin*, Judge.

Action by Lizzie R. Menaugh as administratrix against the Bedford Belt Railway Company and another for damages on account of the death of her husband. From a judgment for defendants, plaintiff appeals. *Affirmed.*

*J. R. East, R. H. East and McHenry Owen*, for appellant.

*T. J. Brooks, W. F. Brooks and F. M. Trissal*, for appellees.



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HADLEY, J.—April 18, 1899, appellee, the Southern Indiana Railroad Company, operated the Bedford Belt Railway, a short line of railroad running from the city of Bedford into the stone quarrying district. At the date given, appellant's decedent, who was her husband, boarded an empty passenger coach standing on the main track in front of a locomotive at the station called Oolitic, the locomotive having behind it about twelve cars, chiefly flats, loaded with stone. Decedent entered the coach without direction or invitation from any employe of the company, the conductor at the time being up the road superintending the making up of the train. One other man entered the same coach. It was an irregular train that was run when and as often as was required to haul out the loaded stone cars to the main railroad lines, generally running daily, but sometimes but twice a week. When the train started for Bedford, the conductor got upon the same coach, it being pushed by the engine. He expressed neither assent nor dissent to the two occupants riding upon the train. He neither requested nor received fare from either of them. Upon arriving at Salt Creek yards about three-fourths of a mile distant from Oolitic the conductor said to the two men: "You fellows go and get on the car behind the engine. We are not going to take the coach to town." The two men went to and boarded the car behind the engine, which was loaded with stone. The conductor went to the rear of the train. After siding the coach, the train proceeded, and, being annoyed by sparks and cinders from the locomotive, decedent suggested to his companion that he was an experienced "railroader" and that the tool-box attached to the rear of the tender was a good place to avoid the cinders, and the two thereupon, of their own motion, and without the knowledge or consent of the conductor, left the car to which they had been directed, and proceeded to the tool-box, slightly elevated the lid by placing iron links under it, and then sat upon it, with their backs to the tender. While in this position the locomotive and tender

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left the track, rolled down an embankment, and appellant's decedent received injuries whereof he died.

This suit was brought by the administratrix for the use of herself as widow, and their children, alleging a negligent causing of the death of her intestate. Demand \$10,000. Appellant having produced evidence tending to prove the above facts, upon appellee's motion the court directed the jury to return a verdict for the defendants. This action of the court presents the principal question for decision.

This case is of a class that is purely statutory, and cannot be maintained without showing that the deceased might have maintained the action, had he lived, for the injuries resulting from the same act or omission. §285 Burns 1894, as amended, Acts 1899, p. 405; *Kauffman v. Cleveland, etc., R. Co.*, 144 Ind. 456, and cases cited.

If the deceased had lived and brought this action it would have been necessary for him to show that the appellees had accepted him as a passenger, and owed him the duty of safe carriage. In the absence of anything to the contrary, we probably must presume that the appellees were operating a commercial railroad, and that in consideration of the rights and franchises granted them by the State they had imposed upon them the duty of a common carrier of passengers. But this implied duty cannot be extended so far as to require the appellees to carry passengers on all trains. Within reasonable limits they had the right to restrict passengers to certain trains prepared for their accommodation, and might properly exclude them from trains designed exclusively for the transportation of freight. *Smith v. Louisville, etc., R. Co.*, 124 Ind. 394; *Indianapolis, etc., R. Co. v. Kennedy*, 77 Ind. 507, 510; Elliott on Railroads, §§1392, 1573.

While a railroad company may agree to carry passengers upon its freight train, and when it does so agree, and accepts a passenger on such train, it is bound to the same degree of care for the safety of such passenger as when upon a train designed for passengers, modified only by the differ-

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ing manner consistent with the usual and practical operation of such train, yet in the absence of an established custom, or some sort of notice that amounts to an invitation, when a person gets aboard a train composed of cars obviously designed for and loaded with stone and other goods, in the absence of the conductor and other employes of the company, he will be presumed to be a trespasser, and the burden rests upon him to prove that he rightfully took passage.

Under the evidence produced, the train taken by the deceased was an irregular freight train running when and as often as sufficient loaded cars accumulated at the quarries. Its coming and going was a matter of chance. Its purpose, to haul empties into, and loads out of the quarries. There is no evidence that it was the custom, or that this train ever before had a passenger coach attached to, or in any way connected with it, in its passage between Bedford and the quarries. There was no evidence that appellees, by any rule, regulation, or custom, accepted passengers on this train. No evidence that the deceased presented himself as a passenger, or that he was in any way invited or recognized as such by the conductor. It is shown that he rode with the conductor three-fourths of a mile to the siding where the coach was left, without anything being said as to destination or fare; that the conductor at no time requested fare, and none was paid or proffered; that when the coach was placed on the siding, and the decedent was directed to get on the car in the rear of the engine, the conductor went his way to the rear of the train, and gave decedent no further attention, manifestly regarding him and his companion as riding upon the train at sufferance, and not as passengers. Going aboard the car loaded with stone, in the rear of the engine, after leaving the coach by invitation of the conductor, did not of itself constitute the decedent a passenger under the circumstances. *Smith v. Louisville, etc., R. Co.*, 124 Ind. 394, 397; *Evansville, etc., R. Co. v. Barnes*, 137 Ind. 306, 312.

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Even if the decedent had been a passenger, appellant shows by her evidence that she is not entitled to recover. She produced uncontradicted evidence that after the train started towards Bedford the decedent and his companion, seeking to avoid the cinders from the locomotive, voluntarily, and without the consent or knowledge of the conductor or other employes of the appellees, left the car to which they had been directed and went to the tender, and having adjusted the lid, located themselves on the tool-box attached to the rear of the tender, and were occupying this position when the accident occurred. This was a place so palpably unfit for passengers to occupy, and naturally so unsafe for them to be during the movement of the train as to amount to conduct of a character which the court will pronounce negligence as matter of law. *Coyle v. Pittsburgh, etc., R. Co.*, 155 Ind. 429, and cases cited.

The rule declared in *Oleson v. Lake Shore, etc., R. Co.*, 143 Ind. 405, at p. 409, is as follows: "Where the evidence given at the trial with all the inferences which the jury may justifiably draw from it is insufficient to support a verdict for the plaintiff so that such verdict, if returned, should be set aside, the court is not bound to submit the case to the jury but may direct a verdict for the defendant." See authorities there cited. The evidence brings the case within this rule.

The record discloses that during the examination of the witness McLaughlin, the plaintiff inquired of the witness if he had ridden upon the train in controversy prior to the date of the accident. The defendants objected. The court sustained the objection, and the plaintiff excepted. After taking an exception to the ruling of the court, the plaintiff made an offer to prove the facts to which the witness would have testified if he had been permitted to answer, to which offer the defendants' further objection was sustained and exception reserved by the plaintiff.

The offer to prove came too late. It has been repeatedly

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held by this court that the only mode of saving a question for review on the exclusion of testimony is this: The examiner propounds his question. The opposite party objects to the question. This forms an issue for the court to decide. Before the court pronounces his judgment, the examiner in support of his question, and for the enlightenment of the judge, must state to the court what the witness on the stand will testify if permitted to answer. With the information thus obtained, the court rules, to which ruling the losing party at the time excepts. The matter is then fully closed. A subsequent offer to prove has nothing to rest upon, and amounts to nothing. *Gunder v. Tibbits*, 153 Ind. 591, 607; *Whitney v. State*, 154 Ind. 573, 579; *Rinkenberger v. Meyer*, 155 Ind. 152.

Judgment affirmed.

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THE STATE, EX REL. HORNE, v. BEIL ET AL.

[No. 19,271. Filed May 28, 1901.]

157	25
164	107

**MANDAMUS.—Health.—Vaccination of School Children.—Complaint.**

—A complaint by the State on the relation of the secretary of the county and city boards of health to compel the school trustees of the city schools to enforce an order of such boards of health requiring all children to be vaccinated before being permitted to attend any of the schools of the county or city respectively is not bad for failure to set out the rule adopted by the boards of health. pp. 26-30.

**HEALTH.—Boards of Health.—Order for Vaccination of School Children.—Mandamus.**—It is the duty of the board of health to determine when there has been an exposure to contagious disease, when the health of the citizens is threatened by an epidemic, and when the preservation of the health of the people demands that the board take action to prevent the spread of such disease, and in an action to compel the school trustees of a city to enforce an order of the board of health requiring all children to be vaccinated before being permitted to attend school it is not necessary to set forth the facts constituting the emergency upon which the order was based. p. 30.

**SAME.—Boards of Health.—Order for Vaccination of School Children.—Enforcement of Order.—Mandamus.—Parties.**—The school trus-

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tees of a city are the proper parties to be called upon to enforce an order of the board of health requiring all children to be vaccinated before being permitted to attend the schools of such city during a threatened epidemic of smallpox. *pp. 30, 31.*

From Wells Circuit Court; *E. C. Vaughn*, Judge.

Mandamus to compel the school trustees of the city of Bluffton to enforce an order of the board of health requiring the vaccination of school children. From a judgment in favor of defendants, plaintiff appeals. *Reversed.*

*J. S. Dailey, A. Simmons, F. C. Dailey, A. L. Sharpe and C. E. Sturgis*, for appellant.

HADLEY, J.—Mandamus to compel the school trustees of the city of Bluffton to enforce a rule or order adopted by the county and city boards of health, requiring all children to be vaccinated before being permitted to attend any of the schools of the county or city, respectively.

The amended complaint is in two paragraphs, substantially the same, and in them the relator sets forth, in effect, that he is the duly elected, qualified, and acting secretary of the Wells county and city of Bluffton boards of health; that on September 4, 1899, the board of commissioners of Wells county, acting in the capacity of county board of health, as a precautionary measure against the introduction and spread of smallpox in the county, adopted a rule, or order, providing that all children desiring to attend the schools of the county should present to their teachers a certificate of successful vaccination, from a regular physician, before being permitted to attend any of such schools; that the relator as such secretary was instructed by the county board to see that such rule was enforced by the school officers of the county; that he served a copy of said order upon the appellees, they, at the time, being school trustees of the city of Bluffton; that in November, 1899, there were many cases of smallpox in the adjacent county of Allen, and no quarantine against persons from the infected community in Allen county coming into the city of Bluffton; that one

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Rupright and his wife had smallpox at their home in Adams county, one-half mile from the east line of said Wells county; that Rupright had passed through the city of Bluffton while suffering from incipient stages of said malady, and, while so afflicted, had spent a night at the town of Ossian, in said Wells county; that while so suffering, Rupright came in contact with divers citizens of the city of Bluffton, and, while at Ossian, school teachers and many other persons were near him and exposed to the disease, and after arriving at his home twenty-seven persons, most of whom were residents of Wells county, were in his sick room, and thereby greatly exposed; that the relator as health officer of the county and city of Bluffton, having investigated and verified the foregoing facts, communicated the same to the county and city boards of health, and, in view of the imminent danger of said contagious disease being transmitted to the inhabitants of the city of Bluffton, the common council of said city, sitting as the said board of health, adopted a resolution for the prompt enforcement of the said rule and order of the county board of health, whereupon the relator, in compliance with said resolution and order, served further notice of said order upon the appellees as trustees of the school city of Bluffton, and directed and demanded them to instruct the teachers under their jurisdiction to carry said rule and order into effect; that appellees failed and refused, and still fail and refuse so to instruct their teachers, or to enforce said rule and order in the schools, whereby, etc. Appellees' separate demurrer to each paragraph of the complaint was sustained, and appellant, refusing to amend, judgment was rendered against him for costs. The sufficiency of the complaint to support a peremptory writ of mandate is the only question presented by the record. Appellees have filed no brief.

Mandamus is the proper remedy to compel an officer to perform a public duty clearly imposed by law. *Wampler v. State, ex rel.*, 148 Ind. 557, 38 L. R. A. 829; *Manor v.*

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*State, ex rel.*, 149 Ind. 310; *State, ex rel.*, v. *Kamman*, 151 Ind. 407; *Wood v. State*, 155 Ind. 1.

By acts of 1891, p. 15, §6711 *et seq.* Burns 1894, the State Board of Health shall have the general supervision of the health and life of the citizens of the State. They shall adopt rules and by-laws subject to and in harmony with the statutes, in relation to the public health, to prevent outbreaks and the spread of contagious and infectious diseases. They shall make sanitary investigations and inquiries concerning the causes of diseases, and especially of epidemics. They shall have power to regulate the plumbing, drainage, water supply, and disposal of *excreta*, heating and ventilation of any public building. By §6718 the commissioners of each county, the mayor and common council of each city, and the trustees of each incorporated town, are constituted *ex officio* a local board of health for their respective municipalities, whose duty it shall be to protect the public health, and in all cases to take prompt action to arrest the spread of contagious diseases, and perform such other duties as may be required of them by the State Board of Health pertaining to the health of the people, and the secretary of any board of health who shall fail or refuse to promulgate and enforce such rules and regulations, and any person or persons, or the officers of any corporation, who shall fail or refuse to obey such rules and regulations, shall be punishable by fine, and, for a second offense, by fine and imprisonment. Section 6719 provides that county boards shall be subordinate to the state board, and the city and town boards subject to the county board, and county boards shall enforce all rules and regulations of the state board in their respective counties, for the preservation of the public health and for the prevention of epidemic and contagious diseases.

In 1891 the State Board of Health, in regular session, adopted a rule which reads thus: "In all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health within whose jurisdiction such exposure



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shall have occurred or danger of such an epidemic ensuing to compel a vaccination or revaccination of all exposed persons.”

In *Blue v. Beach*, 155 Ind. 121, we held with respect to the foregoing provisions, in substance, (1) that the protection and promotion of the public health was a police power of the State, resident in the people, and exercisable by the General Assembly; (2) that the delegation by the General Assembly of authority to the State Board of Health to adopt rules and by-laws in harmony with other statutes in relation to the public health, to prevent the spread of contagious and infectious diseases, was sanctioned by article 4, section 1, of the Constitution of the State; (3) that under the authority thus delegated, and which requires local boards to take prompt action in all cases, to prevent the spread of contagious diseases, a local board of health has power to require that no unvaccinated child shall be allowed to attend the public schools during the continuance of a threatened smallpox epidemic.

In this case it is shown by the complaint that the county of Wells and the city of Bluffton therein, had been, and were still, exposed to a threatened epidemic of smallpox, which information had been by the secretary of the county and city boards of health lodged with such boards, whereupon the county board adopted a rule for the exclusion from the schools of the county of all children who did not present to their teacher a certificate from a reputable physician of successful vaccination; that the said board of health adopted a resolution for the prompt enforcement of the rule of the county board, and that a copy of the county rule and said resolution was served upon the appellees, as school trustees, directing and demanding them to enforce such rule within the schools of the city, and that said trustees failed and refused to do so. The ground upon which the court below held the complaint insufficient is left wholly to conjecture. Appellees have failed to point out any infirmity, and none

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is apparent. It seems to be suggested by the argument of appellant that appellees' contention below was that the complaint was insufficient, (1) for failure to set out in *haec verba* the rule adopted by the board of health, and (2) that the rule as adopted was ineffectual for failure to set forth the facts constituting the emergency therefor. There is no merit in either of these objections. The rule is not the foundation of the action. The rule, when properly adopted and promulgated, as is fully shown by the complaint, had the force and effect of law, *Blue v. Beach*, 155 Ind. 121, and persons called upon to obey it had no right to demand postponement until the wisdom and reasons for the rule were first disclosed to them. Local boards of health are created and authorized by the legislature and duty bound to adopt and enforce rules and regulations for the arrest and prevention of contagious and infectious diseases in their respective jurisdictions whenever the necessity therefor arises. The question of necessity must, from the very nature of the object to be attained, rest within the discretion or judgment of the board of health, which seeks to adopt and enforce the rule. It is the duty of the board to determine when there has been an exposure to a contagious disease, what constitutes an exposure, when the health of the citizens under its jurisdiction is threatened by an epidemic, and when the preservation of the health of the people demands that the board take action to prevent the spread of such infectious disease. And when the board has acted it will be presumed that sufficient facts existed to warrant its action until the contrary appears.

The appellees as officers charged with the public duty of managing the schools of the city of Bluffton are the proper persons to be called upon to enforce the rule in question in such schools. Under §5920 Burns 1894, §4444 R. S. 1881 and Horner 1897, it is their duty to take charge of the educational affairs of their city, to employ teachers, provide suitable houses, furniture, apparatus, and other articles and

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educational appliances necessary for the thorough organization and management of such schools.

It is their duty to determine the length of the school year, when it shall begin, and when it shall end, and when the school shall have vacation, and when it shall be temporarily adjourned and for what cause. Of qualified teachers they may employ whomsoever they please, fix their compensation, and discharge them for cause. They may adopt reasonable rules for the discipline and government of the schools, impose upon pupils the penalty of expulsion for their infractions and require enforcement by their teachers. *State, ex rel.*, v. *Webber*, 108 Ind. 31; *Fertich v. Michener*, 111 Ind. 472.

In short, the teacher is nothing more nor less than the employe of the trustees, subject in all things pertaining to the management of the school to their will and direction. It follows, therefore, that the primary duty of enforcing the rule in controversy rests upon the appellees. That duty is clearly exhibited by each paragraph of the complaint.

Judgment reversed, with instruction to overrule the demurrer to each paragraph of the amended complaint.

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THE STATE, EX REL. BARNETT, v. THE CITY OF  
NOBLESVILLE ET AL.

[No. 19,292. Filed May 28, 1901.]

**STATUTES.** — *Repeal by Implication.* — Repeals by implication are recognized only when the earlier and later acts are repugnant to, or irreconcilable with, each other. *p. 34.*

**MUNICIPAL CORPORATIONS.** — *Removal of City Officer by Common Council.* — The act of 1867 (§8101 R. S. 1881) authorizing the common council of any city by a two-thirds vote of its members to remove a city officer for any offense against the character or duty of his office, is not repealed by implication by the act of 1875 (§6012 R. S. 1881) which provides for the removal of public officers for drunkenness upon complaint being filed in the circuit court by any citizen, or by the act of 1897 (§§8108u-8108gl Burns 1901), which provides for the impeachment and removal of such officers upon accusations in writing by the grand jury. *pp. 34-36.*

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161	469

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**MUNICIPAL CORPORATIONS—Ordinance.—Publication.**—An ordinance which prescribes only the manner in which charges of official misconduct shall be preferred, the notice to be given, and the mode of hearing the evidence, is not penal, nor does it impose a forfeiture; and therefore its publication is unnecessary. *p. 36.*

**SAME.—Removal of City Officer.—Oath of Mayor and Council.**—In the removal of a city officer, under §3101 R. S. 1881, the mayor and common council of a city act under their official oaths, and need not be specially sworn. *p. 37.*

From Hamilton Circuit Court; *Theodore P. Davis*, Special Judge.

Mandamus by the State, on the relation of Frank Barnett, against the city of Noblesville, to compel defendant to reinstate relator to the office of city marshal. From a judgment in favor of defendant, relator appeals. *Affirmed.*

*Geo. Shirts* and *W. R. Fertig*, for appellant.

*I. W. Christian*, *W. S. Christian* and *E. E. Cloe*, for appellees.

**DOWLING, J.**—Application for a writ of mandate to compel the city of Noblesville and its common council to restore the relator to the office of marshal of said city. Alternative writ issued. Demurrers to complaint and to alternative writ sustained. Judgment for appellees. Errors are assigned upon these decisions.

The complaint alleges that the relator, Barnett, was elected and duly qualified as marshal of the city of Noblesville for the term of four years from September, 1898; that he entered upon the duties of his said office, and continued to act as such marshal until prevented by the appellees; that on June 5, 1899, the common council passed an ordinance providing for the summary impeachment of city officers before that body after notice to the accused; that said ordinance was not published in any newspaper until after the commencement of the proceedings against the relator; that on the night said ordinance was passed, an affidavit was filed with said common council charging that the relator, on June 1, 1899, had appeared upon the streets of said city

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in such a state of intoxication as prevented him from performing the duties of his said office; that on the same night the city clerk and mayor were directed to notify the relator to appear before the common council on June 9, 1899, to answer said charge; that, at the time fixed, the relator appeared, and moved to dismiss the proceedings; that his motion was overruled, and the hearing took place; that neither the mayor nor any member of the common council was sworn to try said cause; that at the conclusion of the investigation the relator again moved to dismiss the proceeding, but without avail; that, on June 10, 1899, the common council decided that the charges were sustained, and the mayor thereupon declared the relator expelled and removed from his office of marshal; and that these proceedings were afterwards approved by the common council at its regular session held June 12, 1899. The complaint further shows that at said session the police board was authorized to choose a successor for the relator in said office; that the relator denies the validity of said proceedings, and has refused to surrender his said office, but that he is wrongfully deprived of the same by the appellees by virtue of the proceedings aforesaid. Prayer for a writ of mandate to restore the relator to his office as marshal.

The general act for the incorporation of cities expressly authorized the common council to expel or remove any city officer by a two-thirds vote of the whole number of councilmen elected; and required the common council to make provision in their by-laws, or ordinances, for the mode of presenting charges and the hearing of the same. Acts 1867, p. 75, §88; §3101 R. S. 1881; §3536 Burns 1894.

In 1875 the legislature enacted a statute declaring that any person holding any office under the Constitution or laws of this State, who should voluntarily become intoxicated, within the business hours of his office, or should be in the habit of being intoxicated by the use of intoxicating liquors,

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should forfeit his office, and be removed therefrom, upon the complaint of any citizen filed in the circuit court of the county in which such officer resided. The act prescribes the form of procedure, and the character of the judgment to be rendered. Acts 1875, p. 91; §6012 R. S. 1881; §8088 Burns 1894. By another act, which took effect March 8, 1897, provision was made for the impeachment and removal of any district, county, township, or municipal officer, justice of the peace, or prosecuting attorney, upon accusation in writing by the grand jury. Acts 1897, p. 280, §§21-33.

The common council of the city of Noblesville proceeded under the provisions of §88 of the act of 1867, *supra*, and the appellant insists that this section was repealed by the acts of 1875 and 1897, *supra*, and that the action of the common council was therefore unauthorized and void. The question of the power of the common council to remove the relator is properly presented by his application for a writ of mandamus. §1168 R. S. 1881, §1182 Burns 1894; *City of Madison v. Korbly*, 32 Ind. 74; *Swindell v. State, ex rel.*, 143 Ind. 153, 35 L. R. A. 50.

It is said that one of the common law incidents of all corporations is the power to remove a corporate officer from his office for just and reasonable cause. *King v. Richardson*, 1 Burr. 517; 2 Kyd on Corp., p. 62; Beach on Pub. Corp., §191.

In the case at bar it is claimed that §88 of the act of 1867, *supra*, was repealed by implication. Therefore, it is incumbent on the appellant to show that §88 is inconsistent with some provision of one of the later enactments, or that it has been superseded by them. This, we think, he has wholly failed to do. Repeals by implication are not favored, for the reason, among others, that they often result in uncertainty and confusion. They are recognized only when the earlier and the later act are repugnant to, or irreconcilable with, each other. Where the two statutes even appear to conflict, the court will, if possible, adopt that construction

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which will allow both to stand. *State v. Smith*, 59 Ind. 179; *State v. Wells*, 112 Ind. 237.

The substance of the objections of counsel for appellant to §88 of the act of 1867, *supra*, is that intoxication of a municipal officer, under certain circumstances, has been made a specific cause for removal, and that new remedies for the amotion of officers have been provided by the acts of 1875 and 1897.

There can be no doubt as to the power of the corporation at common law to remove an officer for drunkenness, or other offenses, against his official character and duty. 2 Kyd on Corp., p. 62; *Bagg's Case*, 11 Coke 93; *Rex v. Carlisle*, Fortesc. 200, 11 Mod. 378; *Muhler v. Hedekin*, 119 Ind. 481. But where there is a preëxisting right at common law, and an affirmative statute subsequently inflicts a new penalty, or gives an additional remedy, such statute is held to be cumulative, and not as superseding the preëxisting law. *Toney v. Johnson*, 26 Ind. 382; *Miller v. Goodwine*, 29 Ind. 46; Endlich on Statutes, §236; *Rex v. Robinson*, 2 Burr. 799.

It is said in Endlich on the Interpretation of Statutes, §218: "Further, it is laid down, generally, that when the later enactment is worded in affirmative terms only, without any negative, expressed or implied, it does not repeal the earlier law. Thus, an act which authorized the Quarter Session to try a certain offense would involve no inconsistency with an earlier one which enacted that the offense should be tried by the Queen's Bench, or the Assizes; nor an act authorizing a proceeding to contest the validity of a will, by petition to the court of common pleas, any inconsistency with an earlier one providing for a proceeding by bill in chancery; and in *neither* case, therefore, would the later repeal the prior law."

Placed in juxtaposition, the three acts under consideration may be read as the several sections of a single statute. (1) The common council of any city may, for any offense

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against the character or duty of his office, remove any officer of the city by a two-thirds vote of its members. (2) For intoxication in the business hours of his office, or for habitual intoxication, any person holding an office under the Constitution or laws of this State, shall forfeit his office, and may be removed upon complaint by any citizen of the State filed in the circuit court of the county in which the officer resides. (3) An accusation in writing against any district, county, township, or municipal officer may be presented by the grand jury of the county for or in which the officer is elected or appointed.

The various acts merely provide different remedies for such official misconduct as would have authorized the removal of the officer under the rules of the common law. All are in affirmative terms only, and none of them contains any negative words indicating that the particular remedy provided is exclusive of other remedies. There is not even a seeming conflict between them, and they can, without violence, be so construed as to stand together. In their practical operation the remedies they afford are auxiliary and cumulative. If a common council refuses, neglects, or hesitates to remove a drunken officer, then any citizen has the right to file a complaint for such removal in the circuit court. If no citizen cares to incur the responsibility of such a proceeding, he can go before the grand jury and ask that an accusation in writing be preferred by that body.

In the next place, it is said that the ordinance under which the relator was tried and removed was void because never published. Only such by-laws and ordinances as impose a penalty or forfeiture for a violation of their provisions are required to be published before taking effect. §3535 Burns 1894. The ordinance is not in the record, and is not before us. If, as is probable, it prescribed only the manner in which charges of official misconduct should be preferred, the notice to be given, and the mode of hearing the evidence, it was not penal, nor did it impose a forfeiture, and therefore publication was unnecessary.



## Western Union Tel. Co. v. Ferguson.

Lastly, the point is made that the mayor and members of the common council were not sworn when they entered upon the trial of the charges against the relator. We have not been referred to any statute requiring this formality, and we have found none. The mayor and councilmen were acting under their official oaths, and it was not necessary that they should be specially sworn in the proceeding to remove the relator.

There is no error in the record. Judgment affirmed.

## WESTERN UNION TELEGRAPH COMPANY v. FERGUSON.

[No. 19,297. Filed May 28, 1901.]

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157	91
157	37
165	171

**TELEGRAPH COMPANIES.—Failure to Transmit Message.—Aggrieved Party.**—The “aggrieved party” under §§5511, 5512 Burns 1894 providing a penalty for the failure of telegraph companies to receive and transmit messages as in the statute provided is the person whose message the telegraph company has refused to receive or failed to transmit on the terms or in the manner prescribed by the statute. pp. 40, 41.

**SAME.—Failure to Transmit Message.—Penalty.**—In an action against a telegraph company to recover the penalty provided by §§5511, 5512 Burns 1894 for failure to transmit a message as in the statute provided it is not necessary for the plaintiff to show that he has sustained any actual damages. pp. 40, 41.

**SAME.—Failure to Transmit Message.—Penalty.—Constitutional Law.**—The provision of §§5511, 5512 giving the aggrieved party a civil right of action against a telegraph company for a fixed penalty for the failure of such company to transmit a message in the manner prescribed by the statute is not violative of §2 of article 8 of the State Constitution in that it deprives the school fund of a proper source of revenue. pp. 40, 41.

**SAME.—Failure to Transmit Message.—Penalty.—Constitutional Law.**—The statute, §§5511, 5512 Burns 1894, providing a penalty recoverable by the aggrieved party for failure of a telegraph company to transmit a message in the manner prescribed by the statute is not violative of §17, article 5 of the State Constitution which gives the Governor power to grant reprieves, commutations and pardons after convictions, since such terms do not apply to the release of judgments in civil actions. p. 41.

**SAME.—Failure to Transmit Message.—Constitutional Law.**—The statute, §§5511, 5512 Burns 1894, providing a penalty for failure to

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transmit telegraph messages as therein provided is not violative of §1, article 14 in amendment of the federal Constitution which forbids any state to "deny to any person within its jurisdiction the equal protection of the laws," in that it applies to corporations, and not to individuals, as an individual, partnership, or corporation may own and operate a "telegraph line" and do a general business under the name of a "telegraph company." pp. 41, 42.

**TELEGRAPH COMPANIES.—Failure to Transmit Message.—Answer.—Complaint.**—In an action to recover the penalty under §§5511, 5512 Burns 1894 for failure to transmit a telegraph message in the manner prescribed therein an answer alleging diligence on the part of the defendant in attempting to deliver the message to the addressee, and the negligence of plaintiff in failing to furnish an accurate address, was no defense to an allegation in the complaint that defendant failed to "transmit the same with impartiality and in good faith, and in the order of time in which it was received." p. 42.

**SAME.—Failure to Transmit Message.—Answer.—Complaint.**—A special finding, in an action to recover the penalty under §§5511, 5512 Burns 1894 for failure to transmit a message in the manner therein prescribed, that the message was not transmitted and delivered in the order of time in which it was received was not a conclusion of law, but a proper statement of fact. p. 42.

**SAME.—Failure to Transmit Message.—Penalty.**—In an action under §§5511, 5512 Burns 1894, to recover the penalty for failure to transmit a message as in the statute provided, evidence that the message was received by defendant's agent at a hamlet that comprised but two houses, and at one of these, within fifty yards of defendant's office, the addressee had been living for six weeks prior to the receipt of the message, and that the agent never inquired at this house, and never delivered the message, but subsequently delivered other messages to other persons in the hamlet, warranted a finding of negligent failure to transmit the message in the order of time in which it was received, and the assessment of the penalty therefor is sustainable under the statute. *Western Union Tel. Co. v. Steele*, 108 Ind. 163; *Western Union Tel. Co. v. Swain*, 109 Ind. 405, and *Western Union Tel. Co. v. Jones*, 116 Ind. 861, disapproved. pp. 42-44.

From Monroe Circuit Court; *W. H. Martin*, Judge.

Action against telegraph company to recover statutory penalty for failure to transmit message. From a judgment for plaintiff, defendant appeals. *Affirmed*.

*T. J. Loudon, J. H. Loudon, S. N. Chambers, S. O. Pickens* and *C. W. Moores*, for appellant.

*J. E. Henley* and *J. B. Wilson*, for appellee.

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BAKER, J.—Appellee brought this action under §§5511, 5512 Burns 1894, §§4176, 4176a Horner 1897, which read: “5511. That every telegraph company with a line of wires wholly or partly within this State, and engaged in doing a general telegraphic business, shall, during the usual office hours, receive dispatches, whether from other telegraph lines, or other companies, or individuals, and shall, upon the usual terms, transmit the same with impartiality and in good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, or words or figures charged for, or manner or conditions of service between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality: *Provided, however,* That arrangements may be made with the publishers of newspapers for transmission of intelligence of general and public interest out of its order, and that communication for and from officers of justice shall take precedence of all others. 5512. Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of \$100 for each offense, to be recovered in a civil action in any court of competent jurisdiction: *Provided,* Nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations by injunction or otherwise.” The complaint alleges that appellee filed a message with appellant for transmission and paid the usual charges, and that appellant failed to “transmit the same with impartiality and in good faith, and in the order of time in which it was received”. Demurrer for want of facts was overruled. Appellant answered in three paragraphs, (1) general denial, (2) that appellant used reasonable diligence in attempting to deliver the message to the addressee, and (3) that the failure to deliver the message resulted from appellee’s neglect to furnish an accurate address. Demurrer for want of facts was sustained to second and third answers. Special

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findings of facts and conclusions of law. Appellant's motion for a *venire de novo* was overruled. Judgment for \$100 in favor of appellee. Appellant's motion for a new trial was overruled. Error is assigned on each adverse ruling.

The first objection urged against the complaint is that it fails to show that appellee is an "aggrieved party" entitled to maintain the action. The "aggrieved party" under the statute is the person whose message the telegraph company has refused to receive or failed to transmit on the terms or in the manner prescribed by the statute. *Hadley v. Western Union Tel. Co.*, 115 Ind. 191. It is not necessary for the plaintiff to show that he has sustained any actual damages. He may recover compensation for such damages independently of this statute, which furnishes a cumulative remedy and warrants the recovery of fixed punitive damages.

The complaint is also assailed on the ground that the statute under which the action is brought is unconstitutional, because it violates (1) section 2 of article 8, which gives the school fund all moneys that arise "from the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue"; (2) section 17 of article 5, which accords the Governor "the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law"; (3) section 16 of article 1, which prohibits cruel and unusual punishment and provides that "all penalties shall be proportioned to the nature of the offense", and (4) section 1 of article 14 in amendment of the federal Constitution, which forbids any state to "deny to any person within its jurisdiction the equal protection of the laws."

The first objection has been held to be ill-founded in *Burgh v. State, ex rel.*, 108 Ind. 132, *Toledo, etc., R. Co. v. Stephenson*, 131 Ind. 203; *State v. Indiana, etc., R. Co.*, 133 Ind. 69, 18 L. R. A. 502, and *Judy v. Thompson*, 156

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Ind. 533. The legislature might have made the dereliction of duty by telegraph companies a misdemeanor; and if that had been done, the arguments of counsel would require an examination of the question whether or not all or any part of "the fines assessed for breaches of the penal laws of the State" could be given to the informer or prosecuting witness. But, (1) the legislature did not embrace telegraph companies' breaches of public duty within the penal code, and (2) a recovery can not be had by an informer as such, but only by the party aggrieved by the breach of a specific duty owing to himself. So also, the school fund is to be enriched "from all forfeitures which may accrue" to the State. If "all forfeitures" are to go to the school fund, irrespective to the party to whom they "may accrue", it would be futile for any one, so far as his own interests were concerned, to put a condition subsequent in his deed, or bond, or contract. The giving to an aggrieved party a civil right of action for fixed punitive damages against administrators for malfeasance, against public officers for extortion, against mortgagees for failing after demand to release mortgages on the public records, against telegraph companies for violation of statutory duties, and the like, does not deprive the school fund of any of its sources of revenue.

The second objection falls with the first. The terms "reprieves, commutations, and pardons, after conviction," do not apply to the release of judgments in civil actions.

The fact that this is a civil action for the enforcement of a private remedy obviates the third objection also. But even in providing for the punishment of crimes, the legislature is not required to fix maximum and minimum penalties for a particular crime. *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109.

In support of the fourth objection, appellant insists that the statute applies to corporations and not to individuals. In the statute, the business of transmitting messages by telegraph is indicated as being conducted by a "telegraph com-

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pany" in one place, by a "telegraph line" in another, and by any "person or company" in a third. In considering the connection in which the phrases "telegraph company" and "telegraph line" are used, the thought is directed by the context to the *manner* in which the business shall be conducted rather than to the *person* who owns and operates it. An individual, partnership, or corporation may own and operate a "telegraph line" and do a general business under the name of a "telegraph company". After the *manner* in which the business is to be done is prescribed, every *person* who violates the provisions is made liable to the aggrieved party. This statute is to be construed strictly; but strict construction does not require the court to gaze fixedly upon a single phrase and to be oblivious of the act as a whole.

There was no error in sustaining the demurrer to the second and third answers. The complaint, in one paragraph, charged (1) partiality and bad faith, and (2) negligent failure to transmit the message in the order of time in which it was received. The answers of diligence on the part of appellant and of contributory negligence on the part of appellee, professing to meet the whole complaint, were no defense to the charge of partiality and bad faith.

The special finding was full and explicit. The finding that the message was not transmitted and delivered in the order of time in which it was received was not a conclusion of law, but a proper statement of fact. The findings in regard to the location of appellee's residence and what the agent did towards delivering the message show negligence. The motion for a *venire de novo* was properly overruled.

In support of the motion for a new trial, the principal contention is that the evidence disclosed at most a case of negligent failure to deliver the message in the order of time in which it was received, and that for such negligence no recovery can be had under the statute. The message was received by appellant's agent at a hamlet that comprised but two houses. At one of these, within fifty yards of appel-

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lant's office, the addressee had been living for six weeks prior to the receipt of the message. The agent never inquired at this house, and never delivered the message, but subsequently delivered other messages to other persons in the hamlet. This evidence warranted a finding of negligent failure to transmit the message in the order of time in which it was received. Assuming that it fails to show partiality and bad faith, the question is presented whether the assessment of the penalty is sustainable under the statute. Three special duties are laid upon those engaged in the telegraph business. They are required to receive and transmit dispatches (1) with impartiality and good faith, and (2) in the order of time in which they are received, and (3) without discrimination in rates or conditions of service. The failure to discharge any one of these duties subjects the defaulter to the penalty in favor of the aggrieved party. Conceding that the first and third requirements can not be violated except by the intentional wrongdoing of the operator, it does not follow that a transgression of the second may not be committed through negligence. Discrimination in rates, or the display of partiality and bad faith, may, from the nature of the terms employed, imply aggression, wilfulness; but the failure to transmit the message in the order of time in which it is received may occur as well from negligence as from design. If, as appellant insists, there can be no recovery for a breach of the second duty unless it arises from partiality and bad faith, the legislature is convicted of the inanity of inserting a second conjunctive clause that is entirely destroyed by the first. In *Western Union Tel. Co. v. Steele*, 108 Ind. 163, the complaint was for delay in transmission. The action was not based upon the company's failure to transmit the message in the order of time in which it was received. The particular negligence charged was not within the statute, and for that reason the complaint was insufficient. But in holding that no act of negligence was within the statute, we are of the opinion that the phraseology



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of the statute was not weighed with the care that might have been given if the exact question now under consideration had been squarely presented; and in that respect the Steele case and the cases of *Western Union Tel. Co. v. Swain*, 109 Ind. 405, and *Western Union Tel. Co. v. Jones*, 116 Ind. 361, are disapproved. A penal statute should not be extended by implication. But, in construing it strictly, regard should be had for the clear letter of the statute. And it is something more than strict construction that eliminates an entire coördinate clause. Our conclusion is that a breach of statutory duty results from the failure, whether intentional or otherwise, to transmit messages in the order of time in which they are received. Naturally, if the sender addresses a message to a fictitious person, or fails to furnish a correct or sufficient address, so that by the exercise of reasonable diligence the message can not be delivered, the proximate cause of the failure is the act of the sender, and the company has not violated any duty owing to him.

In the motion for a new trial, appellant alleges that the court erred in ordering the production of the original message for the use of appellee at the trial. The objections urged are that appellant had no notice of the motion to produce and that no affidavit of necessity and materiality was filed. The bill of exceptions shows that notice of the motion was served on appellant, but fails to give the date of service. The bill also shows the filing of the motion, but does not set it out. If the motion contained the showing of necessity and materiality, and was verified, there was no occasion for filing a separate affidavit. Besides, the bill does not state that no affidavit was filed, nor that the bill contained all the proceedings in connection with the motion. To challenge the court's ruling successfully, it was appellant's business to bring here a bill of exceptions that shows an error positively, not conjecturally,—and one that was prejudicial to appellant's substantial rights on the trial.

Judgment affirmed.



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157	45
159	510

**MONROE, AUDITOR, v. THE STATE, EX REL. WILLARD.**

[No. 19,808. Filed May 28, 1901.]

**JURY.—Compensation.—Allowance.—Authority of Court.**—The fees of a juror are not allowed by the court. They are merely certified to be due; and if the court fixes the amount to be paid to a juror in excess of the fees and mileage to which he is lawfully entitled the act of the court is without authority, and void. *p. 47.*

**SAME.—Compensation.—No Additional Pay for Night Service.**—Section 1459 Burns 1894, fixing the fees of a juror in the circuit court at \$2 per day, has reference to a day of twenty-four hours or a portion thereof; and a juror is not entitled to additional compensation because the jury is not allowed to separate at night. *p. 48.*

From Delaware Circuit Court; *Albert O. Marsh*, Judge.

Mandamus by the State on the relation of William R. Willard against Robert W. Monroe, as county auditor, to compel the issuance of a county warrant. From a judgment in favor of plaintiff, defendant appeals. *Reversed.*

*C. L. Medsker*, for appellant.

*J. N. Templer, C. C. Ball and E. R. Templer*, for appellee.

**DOWLING, J.**—The relator of the appellee served as a juror on the trial of a criminal cause in the Delaware Circuit Court from November 20, 1899, to December 2, 1899, both inclusive, making thirteen calendar days. He resided at the county seat and was entitled to no mileage. The court allowed the juror \$50 for such service. This allowance was entered on the records of the court, and was duly certified to the county auditor. The relator demanded a warrant on the treasurer for the payment of the sum certified to be due. The auditor refused to comply with this demand, although there was money in the treasury out of which the warrant could have been paid. Upon these facts, as shown by the complaint, an alternative writ of mandate was issued commanding the appellant, as auditor of Delaware county,

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to issue his warrant upon the treasurer of said county for said sum of \$50, payable to the relator, or show cause why he should not do so. Demurrers to the complaint and alternative writ were filed by the appellant, and were overruled. Appellant filed his return to the alternative writ admitting the facts stated in the complaint and writ, but showing specifically that the allowance made to the juror and relator of appellee was for thirteen days' and twelve nights' service, and that the order of allowance was made without notice to the appellant or to Delaware county. The return also stated that the members of the jury were kept together from the time they were empaneled on November 20th until they were discharged on December 2nd; that their meals and lodging were furnished to them during all of said term of service by said county, and that the relator was entitled to \$26, and no more, for his thirteen days' service at \$2 per day; that the appellant, as such auditor, was willing to draw his warrant on the treasurer for said sum of \$26, but that the allowance made by the court, and certified to the appellant, was erroneous, and unauthorized by law.

The propositions relied upon by the relator are: (1) That the allowance made by the Delaware Circuit Court was in the nature of a judgment by which the county was bound, and which was not subject to collateral attack, and (2) that the jury, having been kept together by night as well as by day, the relator was entitled to compensation for two days' service of twelve hours each for every period of twenty-four hours he was so employed as a juror. The statute declares that the fees of jurors shall be \$2 per day while in actual attendance. §1394 R. S. 1881, §1459 Burns 1894. It is further provided that no money shall be drawn from the treasury of any county except by authority of law, and in conformity with the rules prescribed by the statute. §1412 R. S. 1881, §1478 Burns 1894. The auditor may draw his warrant on the treasurer for a sum, the amount whereof, and the time when, and the person to whom the same may

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Monroe v. State, *ex rel.*

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be due, are fixed by law, or ascertainable from a public record, with proof of personal identity. §1413 R. S. 1881, §1479 Burns 1894. He may also draw his warrant upon the treasurer for a sum allowed, or certified to be due by any court of record authorized to use a seal, and having jurisdiction beyond that of justices of the peace, or by the board of county commissioners. §1414 R. S. 1881, §1480 Burns 1894.

All allowances made by the court during any term (except allowances made to special judge and clerk) must be at the close of each term included in one general certificate by the clerk, duly attested and sealed, for payment out of the county treasury. §6519 Burns Supp. 1897, p. 600.

The fees of a juror are not *allowed* by the court; they are merely certified to be due. The statute conclusively fixes the per diem and mileage, and the court has no power either to increase or to diminish them. The court settles only the number of days and miles. The statute does the rest. If a court, after settling the number of days served by the juror, and the distance traveled by him, makes an allowance to the juror in excess of the fees and mileage to which he is lawfully entitled, it acts without authority, and its proceedings are void. In settling the account of a juror, the power of the court is strictly circumscribed and limited, and it is without authority to make any appropriation of the public funds for that purpose, except such as is expressly conferred by statute.

It is held in this State that even allowances, properly so called, made by courts for services to be paid for by the county, are not *judgments* and are only *prima facie* evidence of the validity and amount of the claims allowed. In the case before us, the county was not a party to any action or proceeding in which these fees were stated. It had no notice of the time and place when and where the statement would be asked for. The action of the court was entirely *ex parte*, and bound no one. The court possessed neither

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inherent nor statutory power to settle the amount of the compensation of the juror at a sum in excess of the fees fixed by law; nor could it exercise such authority as the agent of the county. *State, ex rel., v. Snodgrass*, 98 Ind. 546; *Board, etc., v. Summerfield*, 36 Ind. 543; *State, ex rel., v. Jamison*, 142 Ind. 679.

The bill of court expenses certified by the judge showed upon its face that the fees credited to the relator were double the amount lawfully due him. Under these circumstances, it was the duty of the auditor to refuse to draw his warrant for the excessive and unauthorized allowance.

An effort is made to sustain the action of the court upon the ground that the jury were not permitted to separate, and that the jurors should be compensated for night work by extra fees. Jury service is an important incident of citizenship, and is sometimes regarded as an onerous and unpleasant duty. It is indispensable to the public welfare, and the due administration of justice. It may be imposed and exacted by the State as peremptorily as service in the military forces of the commonwealth. The State has the right to fix the compensation for such service, and no question of adequacy can be raised. In the construction of the statute, declaring what shall be paid to a juror, the *quantum meruit* is not to be considered.

When the statute says that the fees of jurors shall be \$2 per day, while in actual attendance, it contemplates a calendar day of twenty-four hours, if continuous attendance and service are required, extending from the opening of the court on one day until its opening on the next. If the juror serves but ten minutes of the day, he is nevertheless entitled to his \$2. If he is kept with his fellow jurors for twenty-four hours, he gets no more. There is absolutely no authority for splitting the calendar day into parts, as was done here, and counting each part, thus arbitrarily created, as an entire juridical day. If this could be done in the case of jurors, why not as to witnesses, clerks, and special judges,

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if the business of the trial court required their presence at night sessions? The statute intends nothing of the sort.

The juror was entitled to \$26 only. The court had no power to double his time by making two days out of one. Its unauthorized proceeding is protected by no presumption of correctness, nor other rule of law. It was void upon its face, and it was the duty of the auditor to disregard it.

The judgment is reversed, with instructions to the court to sustain the demurrers to the complaint and alternative writ of mandate, and for further proceedings in accordance with this decision.

## BELLEDIN v. GOOLEY.

[No. 19,890. Filed May 28, 1901.]

157	49
171	94
171	95

**WILLS.—Witnesses.—Wife of Beneficiary.**—Under the provisions of §§507 and 509 Burns 1894, the wife of a beneficiary of a will is not a competent witness to the execution of such will.

From St. Joseph Circuit Court; *Lucius Hubbard*, Judge.

Action by Laura S. Belledin against David Gooley to contest the will of Lewis Gooley on the ground that the wife of David Gooley was not a competent witness to the execution of the will. From the ruling of the court on demurrer to the complaint, plaintiff appeals. *Reversed.*

*J. W. Talbot* and *J. E. Talbot*, for appellant.

*J. E. Fisher* and *J. F. L. Meyer*, for appellee.

**MONKS, C. J.**—Lewis Gooley by his last will gave all his property, real and personal, remaining after the payment of his debts and funeral expenses, to his brother, David Gooley. Said will was “attested and subscribed” by two witnesses, one the attorney who wrote the will, and the other Lidy Gooley, the wife of David Gooley who was the sole beneficiary under said will.

Appellant brought this action to contest said will on the ground that the wife of David Gooley was not a competent witness to the same.

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A demurrer for want of facts was sustained to each paragraph, and this ruling of the court is assigned for error.

In this State it is provided by statute that "No will except a noncupative will shall affect any estate, unless it be in writing, signed by the testator, or by some one in his presence with his consent, and attested and subscribed in his presence by two or more competent witnesses; and if the witnesses are competent at the time of attesting, their subsequent incompetency shall not prevent the probate thereof." §2746 Burns 1894, §2576 R. S. 1881 and Horner 1897. An attesting witness is competent, under said section, if, at the time of such attestation, he is competent to testify in court to the facts which he attests. *In re Holt*, 56 Minn. 33, 45 Am. St. 434, 22 L. R. A. 481, 483; *Jenkins v. Dawes*, 115 Mass. 599; *Morrill v. Morrill*, 53 Vt. 74, 78, 38 Am. Rep. 659. The question to be determined, therefore, is whether or not appellee's wife was a competent witness when she attested said will. A large number of the authorities upon the subject of subscribing witnesses and their competency are collected in the note to *Stevens v. Leonard*, (154 Ind. 67), 77 Am. St. 446, 459, 469. In this State, however, the question of the competency of such witness is to be determined by statute. Section 504 Burns 1894, §496 R. S. 1881 and Horner 1897 makes all persons, whether parties to or interested in the suit, competent witnesses in a civil action or proceeding, except as otherwise provided in said act. One of the exceptions is that "In all suits by or against heirs or devisees, founded on a contract with or a demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor." §507 Burns 1894, §499 R. S. 1881 and Horner 1897. This section has been held to apply to actions to contest wills. *Lamb v. Lamb*, 105 Ind. 456, 458, 459; *Staser v. Hogan*, 120 Ind. 207, 214; *Burkhart*

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v. *Gladish*, 123 Ind. 337, 345, 346; *McDonald v. McDonald*, 142 Ind. 55, 87, 88.

These cases also hold that parties to an action to contest a will are not excluded from testifying respecting matters open to the observation of all the friends and acquaintances of the deceased, such as the mental capacity of the testator. But that they are incompetent to testify concerning matters connected with the execution of the will, and all other matters not open to such observation. *McDonald v. McDonald*, *supra*, 87; *Burkhart v. Gladish*, *supra*, 346; *Lamb v. Lamb*, *supra*, 459.

It is evident from said authorities that a devisee under a will is not a competent witness concerning matters connected with its execution. Section 509 Burns 1894, §501 R. S. 1881 and Horner 1897, provides: "When the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded; except that the husband shall be a competent witness in a suit for the seduction of the wife, but she shall not be competent."

Under said section and the authorities cited it is clear that when the husband or wife of a devisee is a witness to such will, that such husband or wife is not a competent witness to prove the due execution of said will. This is true, because in such case, under §507 (499), *supra*, the devisee is not a competent witness concerning matters connected with the execution of the will, and the husband or wife of such devisee, although a witness to the will, is, under §509 (501), *supra*, incompetent at least to the same extent the devisee is. It is true, under §510 Burns 1894, §502 Horner 1897, that in all cases referred to in §§507, 509 (499, 501), *supra*, any party to such suit has a right to call and examine any party adverse to him as a witness, or the court may, in its discretion, require any party to a suit, or other person, to testify, and that any abuse of such discretion is reversible on appeal.

An incompetent witness who is called and examined by the

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adverse party, or required by the court to testify under said section, only becomes competent when so called and examined or required to testify, and not before.

If a witness to a will, whose husband or wife is devisee thereunder, is called and examined or required to testify, under said section, such witness becomes competent at that time. It is not sufficient under our statute that the witness to a will may be competent when the will is proved; he must be competent at the time of attestation. §2746 (2576), *supra*.

It is held in Iowa, Minnesota, and Texas, that the husband or wife of a devisee is a competent witness to such will. *Hawkins v. Hawkins*, 54 Iowa 443; *Bates v. Officer*, 70 Iowa 343; *In re Holt*, 56 Minn. 33, 45 Am. St. 434, 22 L. R. A. 481; *Gamble v. Butchee*, 87 Tex. 643, 647.

In said states, however, the husband and wife are competent witnesses for each other in all proceedings to probate wills, while in this State they are not competent witnesses for each other in such cases. It follows that the court erred in sustaining the demurrer to each paragraph of the complaint.

Judgment reversed, with instructions to overrule said demurrer, and for further proceedings not inconsistent with this opinion.

## THE STATE v. FLYNN ET AL.

[No. 19,505. Filed May 28, 1901.]

OFFICERS.—*Penalty.—Liability on Official Bond.*—The penalty imposed on an officer by §132 of the act of March 11, 1895, for failure to report or pay over fees collected is in the nature of a punishment of the officer, and cannot be recovered by the State in an action on an official bond conditioned that such officer shall faithfully discharge his duties and pay over all moneys coming into his hands as such officer.

From Tippecanoe Circuit Court; *W. C. L. Taylor*, Judge.

Action by State against David H. Flynn and others. From a judgment in favor of defendants, plaintiff appeals. *Affirmed*.

157	52
158	188
157	52
159	573
157	52
160	670
157	52
161	562



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*E. A. Randolph and C. E. Thompson, for State.*

*A. L. Kumler, T. F. Gaylord, G. P. Haywood and C. A. Burnett, for appellees.*

DOWLING, C. J.—This was an action upon the official bond of the appellee David H. Flynn, clerk of Tippecanoe county, to recover from him and his sureties the penalty imposed by §132 of the act of 1895 (Acts 1895, p. 357), for the failure of the officer to make the reports required by law, and to pay the amount due from him into the county treasury. The complaint was in two paragraphs, to each of which the appellees, separately, demurred for want of facts. The demurrers were sustained. The appellant elected to stand by its complaint, and there was judgment for the appellees. The errors assigned are upon the rulings on the demurrers.

The complaint, after alleging the election and qualification of the clerk, and the due execution of his official bond, charged, as a breach thereof, that the officer received and collected, by virtue of his office, fees to the amount of \$17,648.31, which he failed to report and pay over, but wrongfully converted to his own use. Judgment for an equal amount, as the penalty given by the statute, was demanded.

The general provision of the statute concerning official bonds is as follows: "All official bonds shall be payable to the State of Indiana; and every such bond shall be obligatory to such State upon the principal and sureties, for the faithful discharge of all duties required of such officer by any law, then or subsequently in force, for the use of any person injured by any breach of the condition thereof." §7543 Burns 1894, §5528 R. S. 1881.

The statute required that the clerk should give bond in such sum as should be determined by the board of commissioners, with surety, to be approved by the board, conditioned for the faithful discharge of the duties of his office, and the payment to the proper person, or persons, of all moneys that should come into his hands as such clerk.

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The bond so executed by the appellee and his sureties contained this stipulation: "The condition of the above obligation is such that if the above bounded David H. Flynn shall faithfully discharge the duties of the office of circuit court clerk of said county and State, and shall pay over on demand to the person or persons entitled or authorized to receive the same all moneys that may come into his hands as such circuit court clerk, by virtue of his office, then this obligation is to be void," etc.

The section of the statute under which the penalty sued for in this action is claimed is in these words: Acts 1895, pp. 304, 357, §132. "Any officer failing or refusing to make the reports required by law, or to pay the amount due from him into the county treasury, shall forfeit and pay to the State the sum equal to the amount of the fees actually collected during that quarter to be recovered by the prosecuting attorney in any court of competent jurisdiction, one-half to be paid to such prosecuting attorney, and the balance into the common school fund."

It is not alleged in the complaint that any part of the moneys which Flynn collected and failed to report and pay over belonged to the State, or that the State sustained any injury by such failure. The statute itself declares that the fees and costs collected by the clerk "shall in no sense belong to, or be the property of the clerk, but shall belong to and be the property of the county." Acts 1895, p. 334, §114, §6519 Burns Supp. 1897. This action is not prosecuted for the benefit of the county, but solely for the purpose of enforcing the penalty given to the State and prosecuting attorney by the statute, and compelling its payment by Flynn and his sureties, as an obligation upon his official bond.

Can the penalty so given be enforced in an action on the bond of the clerk? It is entirely clear that it cannot. The bond is intended to protect and indemnify all persons, natural and artificial, who may sustain injury by reason of a breach of its conditions by the officer. The penalty given

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by the statute is designed to punish the officer for his failure to perform a duty imposed by law. It is in no sense remedial, and it is not intended as a substitute for any remedy for injury or loss to which the State may be entitled.

The rule in such cases is thus stated in a late treatise on official bonds: "The obligation of a surety for the due discharge of his official duties by his principal, is that the surety will answer the damage that may result from a breach of the bond; it is not that the principal will respond to such fines and penalties for his misconduct, as may be prescribed by law, and awarded by judicial authority. The fine and penalty are punishment for neglect of duty, and may be imposed or incurred, irrespective of actual damage or loss, suffered by any one. Thus, an officer may be fined, or have a judgment rendered against him for a penalty, in a case in which nominal damages only could be recovered on his official bond, the breach of his duty not having caused any actual loss to any one." Murfree on Official Bonds, §654; *McDowell v. Burwell*, 4 Rand. (Va.) 317, cited by this author, is directly in point, and fully sustains the proposition stated in the text.

In Mechem's Public Offices and Officers, §282, it is said: "The contract of sureties upon an official bond is subject only to the strictest interpretation. They undertake, in the language of Judge Cooley, 'for nothing which is not within the letter of their contract. The obligation is *strictissimi juris*; and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent.' " *Detroit Savings Bank v. Zeigler*, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456.

In *Treasurers, etc., v. Sureties, etc.*, 8 Rich. L. R. (S. C.) 412, pp. 413, 414, the law is thus stated: "We concur with the judge below, that the defendants were not liable for penalties imposed on the sheriff by the acts of 1796, 1799, 1827, for not paying over to the plaintiffs in execution

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money by him collected under it, and for not returning executions according to law. The undertaking of the securities is, that the sheriff shall discharge the duties of his office; his failure to pay over money collected by him, or to return the executions in his office, according to law, are violations of his duty, and consequently breaches of the covenant contained in the condition of his official bond; and the securities become thereby liable to respond in damages to the parties interested. But penalties imposed on the sheriff for a violation of his duties are not damages sustained by the parties affected by his default. They are punishments inflicted by the law on the sheriff himself for a *quasi* criminal neglect of duty."

In *Jeffreys v. Malone*, 105 Ala. 489, 17 South. 21, it was held that the sureties on the bond of a probate judge were not liable for the payment of the penalty imposed upon the judge for issuing a marriage license to a minor without the consent of the parent or guardian.

In *Brooks v. Governor*, 17 Ala. 806, the court decided that the sureties of a clerk were not liable for the statutory penalty, whether the act of the clerk was to be deemed malfeasance, nonfeasance or misfeasance in the performance of official duty. The reason of the decision was that the act of the clerk was not productive of legal damage or injury; and for such act the statute did not in terms fix liability on the sureties. *Blake v. McKim*, 103 U. S. 336, 26 L. Ed. 563; *Tiffany v. National Bank*, 18 Wall. 409, 21 L. Ed. 862.

If the legislature had intended to make the sureties liable for penalties imposed upon the clerk, or other officer, it would have so declared. Illustrations of such intent may be found in the act of June 5, 1883, §7568 Burns 1894; Acts 1875, p. 55, §7279 Burns 1894, §5315 R. S. 1881.

The provision of the statute that as between the sureties and the State the sureties shall be deemed and taken as principals, §7549 Burns 1894, and that they shall set up no

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defense to an action for a breach of the bond not available to the principal, does not render the sureties liable for forfeitures or penalties imposed on the principal. *Hawkins v. Thomas*, 3 Ind. App. 399, 402, and cases cited. The present action could no more have been maintained on the bond against the principal therein than against the sureties.

The question of the constitutionality of §132 of the act of 1895 is discussed by counsel for appellees, but it is not necessary to the determination of the case that we should consider it.

The complaint did not state a cause of action for which the clerk and his sureties were liable on his official bond, and the demurrers were properly sustained.

Judgment affirmed.

## HIGGINS v. THE STATE.

[No. 19,535. Filed May 28, 1901.]

**BRIBERY.—Indictment.—Criminal Law.**—An indictment against a member of the common council under §2097 Burns 1894 for soliciting pay for granting a franchise to a company to operate a switch across certain streets and alleys of the city which charges the offense in the language of the statute is sufficient, and it is not necessary to charge therein that the defendant intended to vote for the ordinance because of the money solicited. *pp. 58, 59.*

**SAME.—Evidence.—Former Offenses.**—In a prosecution of a member of a common council for soliciting a bribe from one interested in the passage of an ordinance granting a franchise to a company to operate a switch across certain streets and alleys of the city, evidence that defendant solicited a bribe with reference to another ordinance pending before the common council was admissible for the purpose of showing intent or motive. *pp. 59-62.*

**SAME.—Evidence.—Intent.—Former Offenses.**—The fact that the language alleged to have been used by a member of a city council in soliciting a bribe, in a prosecution for bribery, was not equivocal, and that the jury had the right to infer therefrom the intent charged, does not render other proof of such intent or motive incompetent. *p. 62.*

**SAME.—Evidence.—Intent.**—In a prosecution for soliciting a bribe evidence to the effect that defendant had on a previous occasion solicited a bribe was properly admitted for the purpose of showing

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165	528
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defendant's motive, although defendant stated in objecting to the proposed evidence that he did not attempt to avoid criminal responsibility by relying upon the lack of intent, as such statement did not relieve the State from the burden of proving the criminal intent of the language used by defendant in the alleged solicitation. p. 62.

EVIDENCE.—*Criminal Law.—Testimony of Defendant Before Grand Jury.—Shorthand Copy.*—A shorthand report of the testimony of defendant as a witness before the grand jury was properly admitted in evidence at the trial for the purpose of impeaching defendant, where the stenographer who took down the evidence testified, before reading the same, that it was a true and complete report thereof, although he testified that he had no recollection of defendant's testimony independent of the shorthand copy thereof. pp. 62, 63.

From Marion Criminal Court; *Fremont Alford*, Judge.

From a conviction for soliciting a bribe, defendant appeals. *Affirmed.*

*H. N. Spaan, C. W. Smith, J. S. Duncan, H. H. Hornbrook* and *A. Smith*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

MONKS, C. J.—Appellant was indicted, tried, and convicted, under §2097 Burns 1894, §2010 R. S. 1881 and Horner 1897, for soliciting a bribe. The assignment of errors calls in question the action of the court in overruling the motion to quash the second count of the indictment, and in overruling the motion for a new trial.

Appellant was a member of the common council of the city of Indianapolis. In May, 1900, while an ordinance, granting the Parry Manufacturing Company the right to lay, maintain, and operate a switch across certain streets and alleys in said city, was pending before the common council of said city, it is alleged that appellant solicited pay for granting the said franchise from David M. Parry, the manager of said company. It is insisted that the second count of the indictment is not sufficient, for the reason that it is not alleged therein that "appellant intended to vote for said

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ordinance because of the money so solicited.” The part of the statute upon which said count is based provides that “whoever, either before or after he is \* \* \* elected, appointed, qualified or sworn as a \* \* \* member of the common council of any city, \* \* \* solicits \* \* \* any money or other valuable thing to influence him with respect to the discharge of his duties as such, shall be imprisoned,” etc. Such allegation was unnecessary; it was sufficient to charge the offense in the language of the statute. *State v. Miller*, 98 Ind. 70, 72, and cases cited.

Appellant claims that the court erred in admitting the testimony of a witness that appellant in the spring of 1900 solicited a bribe with reference to another ordinance then pending before the common council of said city. It is insisted that the offense charged in this case “is not one of that class in which similar, independent, crimes can be proved in order to prove intent or motive.” While it is a general rule that in the prosecution of one offense it is not competent to give evidence of another distinct and independent crime, yet it is well settled that the prosecution cannot be denied the right to give such evidence, if otherwise competent, on the ground that it tends to establish another offense.

In *Thomas v. State*, 103 Ind. 419, 432, this court said: “But there are cases where evidence of other like offenses, committed by the defendant, is relevant and competent in the case on trial. The admissibility of such evidence in such cases is, in a sense, an exception to the general rule. In such case, the evidence is not to be excluded simply because it may show that the defendant had been guilty of other offenses. It is said in Roscoe Crim. Ev. 90: ‘The notion that it is in itself an objection to the admission of evidence that it discloses other offenses, especially where they are the subject of indictment, \* \* \* is now exploded. \* \* \* If the evidence is admissible on general grounds, it can not be resisted on this ground.’ ”

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Where it is essential to prove the identity of the offender, malice, guilty knowledge, intent, motive, or the like, other crimes, if they tend to prove such facts, may be given in evidence. Wharton's Crim. Ev. (9th ed.), §§31-55; 3 Rice on Ev., §155; 3 Greenleaf on Ev., §§15, 111, 111a; 1 Greenleaf on Ev., §53; Roscoe's Crim. Ev. (7th ed.), 90-100; 3 Russell on Crimes (9th Am. ed.), 279-293; Gillett's Ind. & Col. Ev., §57; *Thomas v. State*, 103 Ind. 419, 432, 434; *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987, 14 Am. Dig. (Cent. ed.), §825, Col. 1465, §835 Col. 1485. Such evidence has been received in prosecutions for uttering counterfeit money (*McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510; *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263; 14 Am. Dig. [Cent. ed.] Crim Law, §826); uttering forged instruments (Rice on Ev., §484, pp. 779, 780; *Commonwealth v. Coe*, 115 Mass. 481, 501; *Langford v. State*, 33 Fla. 233, 14 South. 815; *Anson v. People*, 148 Ill. 494, 35 N. E. 145, 14 Am. Dig. [Cent. ed.] Crim. Law, §828); receiving stolen goods (*King v. Dunn*, 1 Moody C. C. 146; *Copperman v. State*, 56 N. Y. 591, 14 Am. Dig. [Cent. ed.] Crim. Law, §829); conspiracy to extort money by threats (*State v. Lewis*, 96 Iowa 286, 297, 298, 65 N. W. 295); filing and collecting a false claim against the county (*State v. Brady*, 100 Iowa 191, 69 N. W. 290, 36 L. R. A. 693); obtaining property by false pretenses (*Reg. v. Francis*, 12 Cox Crim. Cas. 612, L. R. 2 Crim. Cas. 128; *Commonwealth v. Stone*, 4 Metc. (Mass.) 43, 47; *Commonwealth v. Eastman*, 1 Cush. 189, 216; *Commonwealth v. Coe*, 115 Mass. 481; *Weyman v. People*, 4 Hun 511, 62 N. Y. 623; *People v. Shulman*, 80 N. Y. 373; *Trogdon v. Commonwealth*, 31 Gratt. 862; 12 Am. & Eng. Ency. of Law, 861, 862; Harris' Crim. Law 369, 14 Am. Dig. [Cent. ed.] Crim. Law, §830); embezzlement (*Rex v. Davis*, 6 Car & P., 177; *Reg. v. Richardson*, 2 Fost. & F. 343; *Dunn's Case*, 1 Moody C. C. 146; *Rex v. Balls*, 1 Moody C. C. 470; *Reg v. Richardson*, 8 Cox C. C. 448; *Commonwealth v. Price*, 10 Gray 472, 476; *Commonwealth v. Tuckerman*, 10 Gray



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173, 197-201; *People v. Shulman*, 80 N. Y. 373, 374, and cases cited; *People v. Cobler*, 108 Cal. 538, 41 Pac. 401, 14 Am. Dig. [Cent. ed.] Crim. Law, §827); bribery (*Guthrie v. State*, 16 Neb. 667, 21 N. W. 455; *State v. Williams*, 136 Mo. 293, 38 S. W. 75; *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127); burglary (*Frazier v. State*, 135 Ind. 38; *Commonwealth v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *People v. Mead*, 50 Mich. 228, 15 N. W. 95); libel (*State v. Riggs*, 39 Conn. 498; 1 Greenleaf on Ev. §53); larceny (*Crum v. State*, 148 Ind. 401); frequenting a gambling house (*Courtney v. State*, 5 Ind. App. 356, 368); wilfully placing an obstruction on a railroad track (*Barton v. State*, 28 Tex. App. 483, 13 S. W. 783); assault with intent (*State v. Place*, 5 Wash. 773, 32 Pac. 736); arson (*Commonwealth v. Bradford*, 126 Mass. 42, 44; *Commonwealth v. McCarthy*, 119 Mass. 354; *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138; *Rafferty v. State*, 91 Tenn. 655, 16 S. W. 728; *Halleck v. State*, 65 Wis. 147, 26 N. W. 572); rape (*Proper v. State*, 85 Wis. 615, 55 N. W. 1035; *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530); abortion (*Scott v. People*, 141 Ill. 195, 30 N. E. 329; *Lamb v. State*, 66 Md. 285, 7 Atl. 399; *State v. Ward*, 61 Vt. 153, 17 Atl. 483); sending obscene or indecent letters or pictures (*Thomas v. State*, 103 Ind. 419); incest (*State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *People v. Skutt*, 96 Mich. 449, 56 N. W. 11); and murder (*Reg. v. Geering*, 18 L. J. Mag. Cas. 215; *People v. Jones*, 99 N. Y. 667, 2 N. E. 49; *Painter v. People*, 147 Ill. 444; 35 N. E. 64).

While such evidence is most frequently received in prosecutions for uttering forged instruments, counterfeit money, and receiving stolen goods, it is not, as we have shown, limited to these offenses, but it is admissible in all cases where malice, guilty knowledge, intent, motive, or the like, is an essential element of the offense, if such other crimes tend to prove the same.

From the authorities cited, it is clear that said evidence

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tended to prove the guilty intent and motive with which appellant used the language alleged in this case to David M. Parry, and was properly admitted for that reason.

It is said that the language used was not equivocal and the jury had the right to infer therefrom the intent charged. While this may be true, it does not render other proof of such intent or motive incompetent. When a fact is to be proved, the law requires the best evidence attainable, but it does not put any limit upon the amount of proof that may be adduced. *Thomas v. State*, 103 Ind. 419, 434.

It is insisted, however, by appellant that "he did not attempt to avoid criminal responsibility by relying upon the lack of intent or want of guilty knowledge", because he stated, when said evidence was offered as a part of the objection thereto, that he would "deny ever having had the conversation which is alleged to have taken place with the witness, David M. Parry."

It is true that appellant made the statement claimed as a part of his objection to said evidence when the same was offered, but such statement did not relieve the State from the burden of proving the criminal intent charged in the indictment. What right had the trial judge, when said statement was made, to say that the criminal intent charged was thereby conclusively established, if the conversation took place? To have so prejudged the case would have been an invasion of the province of the jury. Even if appellant had admitted the criminal intent charged, if the conversation occurred, or that he was guilty as charged if he had such conversation, the admission of the evidence complained of would not have been error. We do not think that the admission of any competent evidence can be rendered erroneous by statements or admissions of the accused made to the court and jury during the trial.

When the grand jury was investigating the case against appellant, he appeared and testified as a witness. This evidence was taken down in shorthand by a stenographer. At the trial of the case appellant testified as a witness in his

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own behalf. In order to contradict him said stenographer was called by the State in rebuttal, and, over objection, permitted to read the part of appellant's evidence before the grand jury, which it was claimed contradicted his evidence at the trial. Before reading from said shorthand copy of the evidence, the stenographer testified that he had no recollection of appellant's evidence independent of the shorthand copy thereof. He also testified that he took the evidence of appellant before the grand jury in shorthand, and that it was true and complete. The court did not err in permitting the witness to read from said shorthand copy. In *Sage v. State*, 127 Ind. 15, 25, 26, a prosecution for murder in the first degree, it was held that it was not error to permit the stenographer to read from his shorthand copy of the evidence the testimony of a witness given on a former trial, who had since died. In *Bass v. State*, 136 Ind. 165, 169, it was held not error to permit the stenographer to read from a typewritten copy of the evidence made from his shorthand notes the testimony of a witness given on a former trial, who had since died.

The rule declared in said cases is correct and is not limited to the testimony of deceased witnesses. If a person takes the evidence at the time it is given, either in longhand or shorthand, and can testify as to the accuracy of his notes, they may be read in evidence, or he may refresh his recollection from said notes, and testify from memory. *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101; *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444; *Stahl v. City of Duluth*, 71 Minn. 341, 74 N. W. 143; *State v. Smith*, 99 Iowa 26, 68 N. W. 428; *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621. Such person may read in evidence such copy made at the time, although aside from said copy he has no recollection of what the witness said, and this may be done in all cases, when such person would be allowed to testify to the same facts from memory. *Wright v. Wright*, *supra*; *Klepsch v. Donald*, *supra*; *State v. Smith*, *supra*.

Finding no error in the record, the judgment is affirmed.

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## WESTERN UNION TELEGRAPH COMPANY v. FERGUSON.

[No. 19,576. Filed May 28, 1901.]

TELEGRAPH COMPANIES.—*Failure to Deliver Message.—Damages.—Mental Anguish.*—An action cannot be maintained against a telegraph company for damages for mental anguish alone resulting from the negligence of the company in failing to deliver a telegraph message. *Reese v. Western Union Tel. Co.*, 123 Ind. 294, overruled. Jordan, J., dissents.

From Monroe Circuit Court; *W. H. Martin*, Judge.

Action against telegraph company for damages. From action of court in overruling demurrer to complaint, defendant appeals. *Reversed.*

*T. J. Loudon, J. H. Loudon, S. N. Chambers, S. O. Pickens, C. W. Moores* and *G. H. Fearons*, for appellant.

*J. E. Henley* and *J. B. Wilson*, for appellee.

BAKER, J.—This appeal has been transferred here by the Appellate Court under §1362 Burns 1894, §6586 Horner 1897, with the recommendation that the case of *Reese v. Western Union Tel. Co.*, 123 Ind. 294, be overruled. *Western Union Tel. Co. v. Ferguson*, 26 Ind. App. 213.

Appellee brought this action to recover damages for appellant's negligent failure to deliver a telegram. The message read: "To Howard Ferguson, Bushrod, Ind. Grandma is dead. Will be buried Thursday, two o'clock. Come. Fred Ferguson." By the failure to deliver, appellee received neither pecuniary nor bodily injury, but suffered mental anguish consequent upon his being deprived of the opportunity of attending his grandmother's funeral. The assignments that the court erred in overruling the demurrer to the complaint and in denying appellant a new trial present the question whether the negligent causing of mental anguish alone is an actionable wrong. An affirmative answer was given in the *Reese* case, decided in 1890, and the

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164	291
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question has not been raised in this court since then. The Reese case is hereby overruled for the following reasons:

(1) Though courts should and do extend the application of the rules of the common law to the new conditions of advancing civilization, they may not rightfully create a new principle unknown to the common law nor abrogate a known one. If new conditions can not properly be met by the application of existing laws, the supplying of needful new laws is the province of the legislative, not the judicial, department. The "mental anguish" law, so called, was first announced in *SoRelle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, decided in 1881. Telegraphy was then a comparatively new element in society; but mental anguish antedated the beginnings of the common law. In determining the limits within which mental anguish was cognizable in the courts, the common law permitted that state of mind to be considered as an element in admeasuring damages in but two classes of cases, broadly speaking. In one, the negligent act was the proximate cause of a physical hurt; and the mental anguish for which compensation was allowed was the proximate result of the physical hurt, not of the negligent act. For the agonies of mind the plaintiff suffered while the train bore down upon him with his foot caught in the frog, not one cent; but damages were allowable only for the mental anguish resulting from the fact that he must go through life a cripple. The using of cases of this class in support of the "mental anguish" doctrine is not an extension of the application of the rules of the common law to new conditions, but is a distortion of the rules themselves, resulting from the failure to distinguish between the mental anguish that is attributable directly to the negligent act and the mental anguish that is the direct result of the physical hurt produced by the negligent act. In the other class of cases, of which malicious prosecution, seduction, libel, are illustrative, the wrongful act was af-

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firmative, was one of commission, not merely of omission, was the product of intent or malice, express or implied; the wrongful act was the proximate cause of a legal hurt (a hurt that the law recognizes) for which damages were recoverable, irrespective of mental anguish; and the damages allowable for mental anguish were not merely compensation for the mental condition produced by the legal hurt but were also punishment for the wilful wrong. This class of cases is further removed from the "mental anguish" doctrine than the first. Not only is there the distinction that exists between the first class of cases and the "mental anguish" doctrine, namely, that in the one the mental anguish hangs upon the hurt produced by the negligent act, while in the other the mental anguish hangs directly upon the negligent act; but there is also the distinction that wilfulness or malice is found in the second class of cases, while the "mental anguish" doctrine is based on pure negligence. One who unintentionally fails to perform a duty should pay compensatory damages only. One who maliciously infringes another's legal rights should pay both compensatory and punitive damages. To apply the rules relating to punitive damages for wilful wrongs to a case of unintentional default, is certainly not a mere extension of the application of the rules of the common law to new conditions. These classes of cases in which mental anguish is cognizable as an incident to causes of action complete without it, at least negatively indicate the common law rule that mental anguish as the proximate and sole result of a negligent act does not constitute a cause of action. And the rule follows affirmatively from the principle that damages may not be remote, nor conjectural, nor speculative. *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502, 525. The supreme court of Florida in *International Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810, in reviewing the Texas decision in *SoRelle v. Western Union Tel. Co.*, *supra*, said: "The court in that case asserts that it is the settled rule of law in that state that

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injury to the feelings, caused by the wilful neglect or failure of another, constitutes such actual damages for which a recovery may be had, and cites as authority for such assertion the cases of *Hays v. Houston, etc., R. Co.*, 46 Tex. 272, 279, and *Houston, etc., R. Co. v. Randall*, 50 Tex. 254, 261. In neither of these cases is the doctrine either settled or asserted that injury to the feelings, or mental suffering alone can be made the subject of a suit for compensative damages. The case of *Hays, supra*, was against a railroad company for damages for wrongfully and forcibly ejecting the plaintiff from its passenger train in the presence of his wife and family, in which it was claimed that the ejection was done in a rude and insulting manner, and by personal violence, resulting in injuries to plaintiff's clothing, and bruises to his person. Exemplary or punitive damages were claimed, and the jury were instructed to estimate the actual damages by the 'injuries sustained by the plaintiff in his person, his estate and his feelings,' and it was held that by this charge the subject of the amount of actual damages was fairly placed before the jury. But nowhere is it asserted that mental suffering alone can be made an independent basis for measuring damages. The case, like many others founded on tort that might be cited, simply holds that mental suffering, or injured feelings, may be taken into consideration as an element of damage when coupled with or accompanied by substantive injury to the person or estate, upon the ground, as stated in the authorities, that in such cases the mental suffering growing out of and produced by the physical injury is so interwoven with the latter that it is impossible to consider the one without contemplating the other. \* \* \* The same may be said of the case of *Randall, supra*. In that case the plaintiff, a brakeman on the defendant's trains, sued the company for damages for its negligence in having an open ditch across its track, into which he fell while performing the duty of coupling two of defendant's cars, and whereby his arm was run over and



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crushed by the cars, necessitating its amputation. In that case, too, the doctrine is sanctioned that an element of the verdict may be compensation for the mental and physical suffering caused by the injury. But nowhere is the doctrine sanctioned that mental suffering alone can sustain an action. For the support of its ruling in the SoRelle case the Texas court next quotes at length the *dictum* of the authors of Shearman & Redfield on Negligence, which *dictum*—as originally incorporated in their work—was entirely without the support of any adjudged case. The seduction case of *Phillips v. Hoyle*, 4 Gray 568, is next invoked to the support of the Texas court, where injury to the feelings of the parent in consequence of the daughter's seduction was held to be an element of damages. The fact seems to have been overlooked, in citing this case to its support, that in cases of seduction, and other torts independent of contract, injured feelings are given consideration, not so much as a criterion for the admeasurement of compensation, but as a standard by which to estimate the enormity of the outrage, wilfully committed, and as a guide whether the damages to be allowed, as punishment, shall be higher or lower. The next and last authority cited to the support of the SoRelle case is the case of *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791, but we fail to find in it any reference whatever to the subject of damages for injured feelings or mental suffering, the whole case being confined to a discussion of the question of the sufficiency of the allegations of a declaration or complaint for general damages as a predicate for the introduction of proof of special damage. The doctrine of the SoRelle case has for its support, then, in reality, only the unsupported *dictum* of Shearman & Redfield in their work on Negligence. In the case of *Gulf, etc., R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, decided in 1883, the SoRelle case was expressly overruled in so far as it held that an action for mental suffering alone could be maintained. In *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W.



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351, 59 Am. Rep. 623, decided in 1886, the Levy case, *supra*, is practically overruled, and the court, without the support of any additional authorities, returns to the doctrine of the SoRelle case. The ruling in *Stuart v. Western Union Tel. Co.*, *supra*, has been adhered to in that state ever since, encumbered, however, with finely drawn distinctions that seem to keep an even pace with the rapid increase of litigation that the enunciation of such a doctrine would naturally engender." An extended examination of the authorities upholding the "mental anguish" rule has disclosed but two claims that the doctrine has any root in the common law. One is, the old maxim that for every wrong there should be a remedy. But, of an antiquity probably as great, at least extending back to the law-latin days, are the phrases "*injuria sine damno*" and "*damnum absque injuria*". The fathers of the common law declared that there were infractions of legal rights that produced no loss or injury the courts could deal with, and also that there were losses or injuries that the courts would recognize except for the fact that no legal right had been infringed. In saying that for every wrong there should be a remedy, by "wrong" they meant a violation of the municipal law, the law of civil conduct, not a transgression of the divine law as such, nor a breach of etiquette; and by "remedy" (limiting it in this case to a remedy by the way of damages) they intended damages that courts, dealing practically with the practical affairs of life, can find to be certain and measurable from evidence the source of which is open to both parties and the nature not transcendental. The common law, so far from furnishing the formula for transmuting a psychical condition into gold, classes the negligent act that causes only mental anguish as an instance of "*injuria sine damno*". The other claim that the "mental anguish" doctrine is an outgrowth of the common law is, the relation of telegraph companies to the public. True, that relation requires telegraph companies to serve all the public impartially, and authorizes the public to control

to a degree the terms of the contract for the transmission of messages. But the same relation exists between the public and railroad companies, public water or gas companies, and the like; and when the "mental anguish" authorities join all others in the realms of English jurisprudence in declaring that merely negligent acts by these latter companies producing mental anguish alone are not actionable at common law, they plainly prove that the "mental anguish" doctrine is not a native sprout, but a foreign graft.

(2) There is no open and practicable means by which the damages occasioned by a negligent act that causes only mental anguish can be assessed. On account of mere difficulties, courts do not and should not falter in finding remedies; but it is not a question of difficulties purely, when it is proposed to violate the natural principles of justice and fair play. The parties to a lawsuit should have an even chance. The damages for which the plaintiff seeks compensation should be shown by evidence that the defendant may test, impeach, refute. When the plaintiff asks to recover for physical injuries, open or hidden, the court may require him, as a condition of prosecuting his case, to submit his person to an examination by medical experts, who may be called as witnesses by the defendant. *City of South Bend v. Turner*, 156 Ind. 418. The determination of the nature and extent of the physical hurt is not dependent upon the eloquence of the plaintiff as a witness, but upon the eloquence of the facts established by the evidence on both sides, which may not have included the verbal testimony of the plaintiff at all. Now, the mental anguish for which damages are allowable is incident to and dependent upon the nature and extent of the physical injury. And, although there can be no absolute standard for measuring mental anguish in terms of money (nor for measuring physical injuries), yet it is apparent that the differences between the physical injuries in two cases, established by evidence open to both sides, furnish a means of testing in some degree the

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existence and extent of the mental anguish of the respective plaintiffs outside of their mere assertions. The difference between the mental anguish caused by the presence of a scar on a man's body and that produced by the presence of the same kind of a scar upon a woman's face would hardly be decided in favor of the man, although he alone of the two possessed the vocabulary necessary for a vivid description of the alleged tortures of mind. Even in the cases of libel, malicious prosecution, and the like, in which punitive damages may be added to compensatory, the mental anguish of which cognizance is taken is measurable by the enormity of the wilful offense, the nature and extent of which are established by evidence open to both sides. But the "mental anguish" doctrine awards damages for a state of mind that is not at all dependent upon nor measurable by a cause of action existing outside the mental contemplation of the plaintiff and provable by evidence open to both parties. If psychometry could determine the difference in the plaintiff's consciousness before and after the defendant's negligent act, it would take something still more occult to measure how much of the total mental disturbance was attributable to the death of the relative and how much to being prevented from attending the funeral.

(3) Manifestly, the defendant is not to pay for the mental anguish caused by the death of the relative. The alleged actionable wrong is in depriving the plaintiff of the opportunity of attending the funeral. But would the plaintiff have accepted the opportunity if seasonably offered? If the defendant is to be mulcted for mere delay, even though the plaintiff would not have gone to the funeral in any event, the damages would be wholly punitive,—there would be no loss to compensate. And so in this case (and probably the same thing has been true in all), the plaintiff was asked the following questions: "Q. Suppose the telegram had been delivered to you on the evening of July 13, 1898, could you have reached her funeral by two o'clock on the 14th?"

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A. I could. Q. I will ask you whether or not you would have done so? A. I would, sir, I would." The plaintiff says he would have gone. But would he? The jury found so as a fact wholly from the plaintiff's present opinion on a past condition of things that never existed but is now summoned before the mind by conjecture. Thus the "mental anguish" doctrine not only departs from principle in regard to measuring compensatory damages, but also warps the rules of evidence which forbid a witness to testify what he would or would not have done in a stated contingency. *Weed v. Martin*, 89 Ala. 587, 8 South. 132: Would you have put the credit on the note if the money had not been paid? *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. 126: (Special interrogatory to the jury.) If the message had been received by plaintiff would he have ordered his stock to be sold? *Allen v. Stout*, 51 N. Y. 668: If you had been permitted to sell those arms, in what condition would it have placed you? *Kansas, etc., R. Co. v. Scott*, 1 Tex. Civ. App. 1, 20 S. W. 725: How many trips would you probably have made per year had the railroad not revoked your pass? *Commercial Bank v. Firemen's Ins. Co.*, 87 Wis. 297, 58 N. W. 391: Would you have settled the loss if you had known that the books of the insured were altered? On the answers to the questions put to the appellee in this case, how could perjury be predicated?

(4) As a corollary of the preceding proposition, it follows that it is contrary to public policy (corruptive of public morals) for the courts to tie the hands of a defendant and give the freest hand in collecting compensatory damages to the plaintiff who is most moving in depicting an alleged psychical condition and readiest to declare what he would have done under circumstances that never occurred.

(5) Denial of equal justice, wrongful discrimination between persons in similar circumstances, is at least as vicious in judge-made as in statutory law. *Yick Wo v. Hopkins*, 118 U. S. 356, 373, 6 Sup. Ct. 1064, 30 L. Ed.

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220. To be a law of equal justice and no discrimination the “mental anguish” doctrine should assert as a broad general principle that damages are recoverable for mental distress alone from every person whose negligent act causes that condition. In *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181, this court suggested: “Suppose the dispatch had been an invitation to a marriage, to a family reunion, or with reference to any other matter where special damages could not be shown, what substantial remedy can the party have, unless it be the recovery of the [statutory] penalty?” And the supreme court of Minnesota, in *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, inquired: “Upon what legal principle can a court refuse to allow them for the breach of any other contract? The breach of any contract—even the failure of a debtor to pay his debt at maturity—may result in more or less mental anxiety or suffering to the party to whom the obligation is due. Why not allow damages for the mental suffering or disappointment of passengers caused by the delay of trains through the negligence of the carrier? The object of the journeys of travelers is often not pecuniary, but to visit sick relatives or attend the funeral of deceased ones, which are matters affecting the feelings as much and as exclusively as a telegram. If the train is delayed through the negligence of the carrier, so that the passenger does not reach his destination in time to accomplish his desired object, why is he not entitled to damages for his disappointment and mental suffering as much as the sender or addressee of a delayed telegram?” But it is useless to undertake to give the instances in which the rule is not the rule, for it is not the rule against any one except telegraph companies, and not against them uniformly. The argument that the gravity and urgency of messages relating to death, and the like, should require the telegraph companies to pay “mental anguish” damages for delay or failure in transmission, should apply to all telegrams of that character. The gravity of the

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matter is disclosed by the announcement of sickness or death and the summons to come. The urgency is apparent from the selection of the telegraph as the means of communication. But, unless the message shows on its face that the addressee is a relative, it is held that the message, equally grave and urgent, fails to give notice that any mental suffering will result from the company's default. The Horatian heir who has been itching for the ancestral estates may recover on the strength of his mourning raiment, while a David who misses the last look upon the face of his Jonathan gets nothing for his bleeding heart.

(6) The difficulties of navigating without chart or compass are understandable without experiment; but the experiences of the courts that uphold the "mental anguish" doctrine probably outrun any mere *a priori* conjecture as to possibilities. A brother-in-law is not a relative of whose mental anguish a telegraph company is bound to take notice without special information on the subject in advance. *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896. Failure to deliver a message reading "Your stepfather died this morning" will support an action. *Western Union Tel. Co. v. Nations*, 82 Tex. 539, 18 S. W. 709. Negligence that results in nothing but mental anguish is not an actionable wrong (*Williams v. Yoe*, 19 Tex. Civ. App. 281, 46 S. W. 659), unless the defendant be a telegraph company and the circumstances favorable (*Western Union Tel. Co. v. Smith*, Tex. Civ. App., 46 S. W. 659). There seem to be vital distinctions between "mental anguish", "mental suffering", and "mental anxiety". *Gulf, etc., R. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419; *Western Union Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549. Failure to deliver a telegram intended to relieve mental anguish is *not* actionable. *Akard v. Western Union Tel. Co.* (Tex. Civ. App.), 44 S. W. 538. Failure to deliver a telegram intended to relieve mental anguish is actionable. *Womack v. Western*

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*Union Tel. Co.* (Tex. Civ. App.), 22 S. W. 417; *Western Union Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, 29 S. W. 932. A telegram reading "Come on first train; bring Ferdinand; his father is very low" *does not* give notice that negligence in transmission will cause the addressee mental anguish. *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. 37. A telegram reading "Grace is very low. Can you come and bring Maud?" *does* give notice that negligence in transmission will cause the addressee mental anguish. *Western Union Tel. Co. v. Linn*; 87 Tex. 7, 26 S. W. 490, 47 Am. St. 58. A telegram reading "Willie died yesterday evening; will be buried at Marshall Sunday evening" *does not* give notice that negligence in transmission will cause the addressee mental anguish. *Western Union Tel. Co. v. Brown*, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766. A telegram reading "Billie is very low; come at once" *does* give notice that negligence in transmission will cause the addressee mental anguish. *Western Union Tel. Co. v. Moore*, 76 Tex. 66, 12 S. W. 949. The supreme court of Minnesota expressed the opinion that the "Texas doctrine" has opened a veritable Pandora box, and the Ohio supreme court states the view that "the wisdom of the doctrine (denying recovery for mental anguish alone) is well illustrated by the experience of the courts that have departed from it". *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. 507; *Morton v. Western Union Tel. Co.*, 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735.

(7) Not to tempt the seas of uncertainty, but to travel *super antiquas vias*, is the course that we believe is prescribed by sound reason and the overwhelming weight of authority. The following telegraph cases are directly in point: *Peay v. Western Union Tel. Co.*, 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463; *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. 408; *International, etc., Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810;



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*Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. 183; *Giddens v. Western Union Tel. Co.*, 111 Ga. 824, 35 S. E. 638; *Western Union Tel. Co. v. Halton*, 71 Ill. App. 63; *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. 530; *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. 507; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. 300; *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. 575; *Newman v. Western Union Tel. Co.*, 54 Mo. App. 434; *Curtin v. Western Union Tel. Co.*, 13 App. Div. 253, 42 N. Y. Supp. 1109; *Morton v. Western Union Tel. Co.*, 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. 648; *Butner v. Western Union Tel. Co.*, 2 Okla. 234, 37 Pac. 1087; *Lewis v. Western Union Tel. Co. (S. C.)*, 35 S. E. 556; *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026; *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. 17; *Chase v. Western Union Tel. Co.*, 44 Fed. 554, 10 L. R. A. 464; *Crawson v. Western Union Tel. Co.*, 47 Fed. 544; *Tyler v. Western Union Tel. Co.*, 54 Fed. 634; *Kester v. Western Union Tel. Co.*, 55 Fed. 603; *Western Union Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Gahan v. Western Union Tel. Co.*, 59 Fed. 433; *Stansell v. Western Union Tel. Co.*, 107 Fed. 668. And these additional cases require the same conclusion: *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. 913; *Texarkana, etc., R. Co. v. Anderson*, 67 Ark. 123, 53 S. W. 673; *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 603, 29 Am. St. 143, 17 L. R. A. 71; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831, 9 Am. & Eng. R. Cas. (N. S.) 513; *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; *Chicago City R. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366; *North Chicago St. R. Co. v. Duebner*, 85 Ill. App. 602; *Kalen v. Terre Haute, etc., R. Co.*, 18 Ind. App. 202,



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63 Am. St. 343; *Cleveland, etc., R. Co. v. Stewart*, 24 Ind. App. 374; *Gaskins v. Runkle*, 25 Ind. App. 584; Dictum in *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Tisdale v. Major*, 106 Iowa 1, 75 N. W. 663; *Atchison, etc., R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Black v. Carrollton R. Co.*, 10 La. Ann. 33, 38, 63 Am. Dec. 586; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Canning v. Williamstown*, 1 Cush. (Mass.) 451; *Spade v. Lynn, etc., R. Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. 393; *Dorrah v. Illinois, etc., R. Co.*, 65 Miss. 14, 3 South. 36, 7 Am. St. 629; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Spohn v. Missouri, etc., R. Co.*, 116 Mo. 617, 22 S. W. 690; *Strange v. Missouri, etc., R. Co.*, 61 Mo. App. 586; *Deming v. Chicago, etc., R. Co.*, 80 Mo. App. 152; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Ward v. West Jersey, etc., R. Co.* (N. J.), 47 Atl. 561; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781; *Ewing v. Pittsburgh, etc., R. Co.*, 147 Pa. St. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. 709; *Knoxville, etc., R. Co. v. Wyrick*, 99 Tenn. 500, 42 S. W. 434; *Gulf, etc., R. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419; *Gulf, etc., R. Co. v. Trott* (Tex. Civ. App.), 25 S. W. 431; *Southern Pac. Co. v. Ammens* (Tex. Civ. App.), 26 S. W. 135; *Chicago, etc., R. Co. v. Hitt* (Tex. Civ. App.), 31 S. W. 1084; *Bovee v. Town of Danville*, 53 Vt. 183; *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 5 Am. & Eng. R. Cas. (N. S.) 238; *Walsh v. Chicago, etc., R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Morse v. Duncan*, 14 Fed. 396; *Wilcox v. Richmond, etc., R. Co.*, 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; *McBride v. Sunset Tel. Co.*, 96 Fed. 81; *Hobbs v. London, etc., R. Co.*, L. R. 10 Q. B. 111, 5 Eng. Rul. Cas. 381; *Lynch v. Knight*, 9 H. L. Cas. 577, 598, 8 Eng. Rul. Cas. 382, 392; *Railway Commrs. v. Coultas*, L. R. 13 App. Cas. 222, 8 Eng. Rul. Cas. 405; *Canadian, etc., R. Co. v. Robinson*, 14 Can. S. C. 105; *Henderson v. Canada, etc., R. Co.*, 25 Ont. App. 437;

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*Jeannotte v. Couillard* (Q. B. 1894), 3 Quebec 461; *Rea v. Balmain, etc., Co.*, 17 N. S. Wales (L. R.) 92.

Judgment reversed, with directions to sustain the demurrer to the complaint.

Jordan, J., dissents.

DISSENTING OPINION.

JORDAN, J.—I can not concur in the majority opinion in this case, and will endeavor briefly to assign the reasons which constrain me to dissent. The real question presented in this appeal is: Are damages which are caused solely by mental anguish suffered by reason of the neglect of a telegraph company to transmit a message to the addressee recoverable in an action by the latter against such company for its neglect? In my opinion this question should be answered in the affirmative. A negative answer by this court necessarily results in disturbing what has been considered and adhered to as the settled law in this State for a period of over twelve years. The rule declared and enforced in *Reese v. Western Union Tel. Co.*, 123 Ind. 294, which was decided in 1889, in my judgment is a salutary one. It is true that the rule in question has been denied by the higher courts of several of our sister states, while, upon the other hand, it has been repeatedly affirmed by others. The following cases may be said to answer the question propounded in this appeal in the affirmative: *SoRelle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. 843; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. 920; *Womack v. Western Union Tel. Co.* (Tex. Civ. App.), 22 S. W. 417; *Western Union Tel. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688; *Wadsworth v.*

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*Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. 864; *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545; *Newport News, etc., R. Co. v. Griffin*, 92 Tenn. 694, 22 S. W. 737; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. 148; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549, 11 S. E. 269; *Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. 883; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880; *Western Union Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. 148; *Logan v. Western Union Tel. Co.*, 84 Ill. 468; *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W. 1, 28 L. R. A. 72.

The following text-writers also assert and maintain that such damages may be recovered. Shearm. & Redf. on Neg. (5th ed.), §756; Thompson Law of Electricity, §379; 3 Sutherland on Damages (2nd ed.), §§975-980, inclusive; 2 Sedgwick on Damages (8th ed.), §894.

Prior to the decision in the Reese case, the question here involved was an open one in this jurisdiction, and I am not convinced that the court, for the reasons expressed in the majority opinion, should at this late day depart from the doctrine asserted and enforced in that case. Nothing is to be gained by courts of last resort in overruling their decisions, especially when the same have stood as the settled law for a long period of time, unless it is evident that they are radically wrong or operate unjustly. The Reese case, *supra*, as we have shown, is well supported by the decisions of other courts and by eminent text-writers, and a settled rule of law of this State should not be abrogated simply because there may be a conflict in the authorities. Not only does the majority opinion overrule the case in question, but it necessarily results in overthrowing the decision in *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. 249, 9 L. R. A. 514. The defendants in the latter case were undertakers

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and funeral directors who had been employed by the plaintiffs to keep safely in a secure vault the body of their dead daughter. They violated their contract with the plaintiffs by allowing the body to be buried at some place unknown to the parents, which place the defendants refused to disclose. The trial court in that case charged the jury that in the assessment of damages they might take into consideration the mental anguish which the parents had suffered on account of the matters set out in their complaint. The charge on appeal was sustained, the court holding that "Where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part."

As a result of the holding in the case at bar it would follow that where a devoted husband or father employed an undertaker to prepare the body of his deceased wife or daughter, as the case might be, for interment, and the latter, instead of carrying out his contract, should deliver the body over to a medical college, where it was dissected, there could be no recovery by the husband or father for the great mental anguish and pain which he necessarily would suffer by reason of the brutal conduct of the undertaker, in disposing, as he did, of the remains of the beloved wife or daughter. Again, upon another view of the question, a railroad train is wrecked upon which the husband of a devoted and loving wife is a passenger; many of the passengers are killed and maimed, which is disclosed to the wife through the public press. Her husband, however, escapes from the wreck uninjured, and immediately telegraphs her that he is safe and for her not to be disturbed in respect to his safety. The telegraph company neglects to transmit the message to the wife, although it is aware of its importance. The wife knows that

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her husband is a passenger on the ill-fated train of the wreck of which she has been apprised and fears that he has been killed or maimed, and of course suffers great anguish of mind and continues to suffer the same until she learns of her husband's safety, all of which is due to the neglect of the telegraph company in not delivering to her the message sent by the husband. Under the harsh rule asserted in this case, she could not recover for the anguish of mind which she suffered and endured, which would be more severe to her, perhaps, under the circumstances, than any physical injury imaginable.

It is said that the common law is not sufficiently elastic to cover such cases, but the fault is not so much in the inelasticity of the law as it is in the narrow manner in which it is construed and judicially applied to a given state of facts. The judges who constructed the common law, when at a loss for a precedent, declared one, which became controlling in the future. The common law certainly can be made to adapt itself reasonably in the furtherance of justice to new conditions which have arisen in this progressive age. It was well said by Judge Deemer, in *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W. 1, 28 L. R. A. 72: "One of the crowning glories of the common law has been its elasticity, and its adaptability to new conditions, and new states of fact. It has grown with civilization, and kept pace with the march of events, so that it is as virile to-day, in our advanced state of civilization, as when the race was emerging from the dark ages of the past. Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into."

It is argued that damages for mental distress can not be recovered at common law for a mere breach of contract. This assertion may be said to be true as a general rule, but like all such rules it is in the administration of justice sub-

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ject to reasonable exceptions. In fact, there is engrafted upon the rule at least one well recognized exception, namely, a man who enters into a marriage contract is presumed to know or contemplate that he is dealing with the affections and feelings of the woman whom he has agreed to marry, and, if he violates his contract, that she will be subject to humiliation, mortification, and mental anguish. In an action by her against him, the law awards, among other things, damages for her wounded feelings. In cases like the one at bar courts should regard the subject-matter of the contract. Where the neglected message relates solely to matters of property, the common law affords adequate compensation. What sound reasons then can be said to exist for construing the law so as to make it deny the liability of a telegraph company when its negligence has resulted in inflicting a great mental shock or mental suffering, which is frequently more painful, under the circumstances, than a physical injury possibly could be. It is contended that in actions arising *ex delicto* accompanied by physical injury, that damages for the wounded or injured feelings may be awarded, but compensation for injury to the feelings is frequently allowed in actions where the matter complained of is unaccompanied by any physical injury. For instance, a passenger lawfully on a train is by the railroad company's agent wrongfully ejected from the car, or rather compelled by the imperative orders or demands of the conductor in charge of the train to leave the car. In an action by the passenger against the railroad company his humiliation and injured feelings, under the circumstances, may be taken into consideration by the jury in the assessment of damages, although he was not touched, or in any manner sustained a physical injury. Such is also the rule in actions for slander or libel. Likewise in malicious prosecutions. *Fisher v. Hamilton*, 49 Ind. 341. Also in actions for false imprisonment. *Stewart v. Maddox*, 63 Ind. 51. The removal of the body of a deceased child from the lot where it was lawfully

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buried to a charity lot is held to entitle the parent of the child to recover against the party removing the body for injury to such parent's feelings. *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. A widow may recover for mental anguish and nervous shock against a person who unlawfully mutilates the body of her dead husband. *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 28 Am. St. 370. See also Sutherland on Damages, §979. Damages are also allowed to a father for his wounded feelings in an action by him against one for the seduction of his daughter. From the above cases it is manifest that damages in actions of tort are frequently allowed for mental suffering or wounded feelings although there is no physical injury. In cases where there is some direct and proximate connection between the wrongful act and the injury to the feelings, whether the action is connected with a contract, or arises out of tort, the allowance of damages for injured feelings and anguish of mind is certainly justifiable. But it is said that in cases like the one at bar the damages demanded are frequently too shadowy and speculative to be properly measured. If this is true, it is equally so in cases of tort. While if true it might afford reasons for requiring courts to scrutinize closely and review the verdicts of juries returned in such cases, but it presents no reason for an entire abrogation of the rule for which I contend. In conclusion I may say that I can not sanction a rule of the law which affirms that a telegraph company, where it neglects to deliver a message to the husband that his wife is dying, or to a father that his son is dead and will be buried at a designated time, is not responsible except for mere nominal damages. Such an interpretation of the law ought not to be sustained. It will certainly result in telegraph companies neglecting their duties in sending messages of such character, as, under the decision in this case, they can virtually escape with impunity.

Without further extending this opinion by the citation of



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authorities and the assignment of other reasons in support of the rule in question, I conclude that the Reese and Renihan cases to which I have referred ought not to be overruled, and that the judgment below should be affirmed.

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**LEE v. MCCLELLAND ET AL., COMMISSIONERS FOR THE REFORM SCHOOL FOR BOYS.**

[No. 19,601. Filed May 28, 1901.]

**CRIMINAL LAW.—Commitment to Reform School.—Constitutional Law.**—Where a minor appeared in open court in person and by counsel and waived arraignment and entered a plea of guilty to an indictment charging him with grand larceny, and the court withheld sentence and released him during good behavior, the subsequent action of the court in committing him to the reform school for boys upon his being brought into court was not in violation of §13 of the bill of rights as depriving the accused of the right to a public trial by jury. *pp. 85-88.*

**SAME.—Commitment to Reform School.—Order-Book Entry.**—Where the accused, upon plea of guilty to an indictment charging him with grand larceny, was released during good behavior and afterward committed to the reform school for boys, the order of commitment is not void because it was not entered upon the order-book where no demand was made that it be entered. *p. 88.*

**SAME.—Commitment to Reform School.—Indictment.—Order.**—Where the record shows only one charge of larceny against accused, and that by indictment to which he entered a plea of guilty, an order of commitment to the reform school for boys, stating that he was brought before the court and committed on a plea of guilty to an indictment for grand larceny, without stating when the charge of larceny was made, sufficiently shows that he was committed on that indictment. *pp. 88, 89.*

**SAME.—Commitment to Reform School.**—In an action by plaintiff to obtain custody of his minor son who had been committed to the reform school for boys it was not error to exclude the testimony of a witness that he was present in court when the commitment was made, and that at that time there was no charge made or filed against him or read to him, since the court had authority to order the commitment on a plea of guilty to an indictment previously made. *p. 89.*

**SAME.—Commitment to Reform School.—Collateral Attack.**—In a proceeding to obtain the custody of plaintiff's son, who had been

157	84
157	212

157	84
158	90

157	84
163	467

157	84
164	462

157	84
167	124

157	84
169	102
169	666



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committed to the reform school for boys on a plea of guilty to an indictment for grand larceny, it must be shown, not only that the order was irregular, but that it was absolutely void, since the proceeding was a collateral attack on the order of commitment. *pp. 89, 90.*

From Hendricks Circuit Court; *Thomas J. Cofer*, Judge.

Action by Elijah Lee for the custody of his minor son who had been committed to the reform school for boys. From a judgment in favor of defendants, plaintiff appeals. *Affirmed.*

*J. B. Kenner* and *U. S. Lesh*, for appellant.

*E. G. Hogate* and *J. L. Clark*, for appellees.

MONKS, C. J.—Appellant brought this action under §8326 Burns 1894, §6223 R. S. 1881 and Horner 1897, to recover the custody of his son, who had been committed to the reform school for boys by the Huntington Circuit Court. The grounds upon which he claimed such recovery were stated as follows in his complaint: “That his son was committed to said institution without any warrant of law, in this, that there was no proceeding in the Huntington Circuit Court to prosecute his said son for crime upon which any finding of record was made, or as to his age; that his son was not brought before the court or judge, and no witnesses were heard, and it was not ascertained by testimony of witnesses that his said son was a suitable person to be committed to said institution, and no record whatever or sentence was ever passed or made, nor was any investigation, hearing, or trial had, or sentence committing him to said institution, upon the records of any court having jurisdiction to make such commitments; but his said son is held without any judgment, sentence, or other legal warrant of law, and is illegally so held and restrained of his liberty.” Appellees filed an answer in which it was alleged that appellant’s son was committed to said institution by the Huntington Circuit Court, and the commitment papers made out and signed by the judge of said court, as required by Acts 1883, p. 19, §§8315, 8318 Burns 1894, §§6213, 6220g Horner 1897,

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and the medical examination as required by Acts 1883, p. 19, §8314 Burns 1894, §6212 Horner 1897, were made a part of said answer. Appellant's demurrer to said answer was overruled and a reply filed. The court tried the case and found for appellees, and over a motion for a new trial rendered judgment against appellant. It appears from the record that the grand jury at the September term, 1899, of the Huntington Circuit Court, returned into said court an indictment charging a son of appellant with the offense of grand larceny in taking the personal goods of one Jerome Bronker. Said indictment was entered on the docket of said court as cause number 1,327. Afterwards, on October 10, 1899, appellant's said son appeared to said cause in open court in person and by counsel and waived an arraignment and entered a plea of guilty to said charge. Thereupon the court found that said accused was thirteen years of age, and in its discretion withheld sentence, and ordered that said accused be released during good behavior, as provided in §1836 Burns 1894, §1767 R. S. 1881 and Horner 1897. Afterwards, on March 23, 1900, appellant and his said son appeared in the Huntington Circuit Court, and the said son was thereupon by said court committed to the reform school for boys until he was twenty-one years of age, on said charge of larceny.

The commitment was made out and signed by the judge of said court in all respects as required by Acts 1883, p. 19, §§8315, 8318 Burns 1894, §§6213, 6220g Horner 1897, but no record thereof was made in the order-book of said court. On the same day appellant made an affidavit that his said son was born on the 5th day of July 1886, and said son was examined by a reputable physician of the county and a certificate of such examination made by such physician as required by Acts 1883, p. 19, §8314 Burns 1894, §6212 Horner 1897. Afterwards, on March 31, 1900, appellant appeared in said cause and filed an application in said criminal cause number 1,327 to revoke and set aside said order

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of commitment, and that his son be permitted to make a defense to any charge that might be preferred against him. The prosecuting attorney filed a written statement setting forth the reasons why said order of commitment should not be set aside, and negating all the material allegations of the application, and objecting to the same being granted.

It was alleged in said statement of the prosecuting attorney that said commitment was made under said indictment for larceny, and the court so announced at the time. The court overruled said application.

Appellant claims that said commitment was in violation of §13 of the bill of rights, being §58 Burns 1894, §58 R. S. 1881 and Horner 1897, which provides: "In all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process for obtaining witnesses in his favor."

It is not shown by the record that appellant's son was deprived of any of the rights mentioned in said section. He appeared in open court in person and by counsel, and entered a plea of guilty to an indictment charging him with grand larceny. Being a minor, the court in its discretion withheld sentence and released him during good behavior. This was authorized by §1836 Burns 1894, §1767 R. S. 1881 and Horner 1897, which section also provides that the court shall have full power to pronounce sentence on said plea of guilty "whenever the conduct of the accused shall in the opinion of the court make such action proper." When the accused was again brought before the court by appellant on March 23, 1900, the court had full power under said section to pronounce sentence against him, if the conduct of the accused, in the opinion of the court, made such action proper. There was nothing for the court to try at that time, as there had

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already been a plea of guilty, and it rested entirely in the discretion of the court to pronounce or withhold sentence, under said §1836 (1767), *supra*.

The court was authorized by §8310 Burns 1894, §6210 Horner 1897, to commit the accused to the reform school for boys, until he attained the age of twenty-one years, instead of the county jail or state prison, on his plea of guilty of the crime of grand larceny, in taking the personal property of Jerome Bronker, as charged in said indictment. This the court did, and made out and signed the commitment, as provided in §8315 Burns 1894, §6213 Horner 1897. It is expressly provided in §8318 Burns 1894, §6220g Horner 1897, that no other record shall be made when the occasion of the commitment is a criminal charge, unless demanded by the infant, his parent, or guardian.

Appellant insists that the order committing the accused should have been entered in the order-book, and as it was not, the court below should have ordered his discharge in this proceeding. The accused, his parent, or guardian, had the right to have said commitment entered on the order-books of said court, and, by failing to make a demand therefor, waived such right, and appellant cannot now complain. Said commitment, signed by the judge, is a record and a part of the proceedings in said cause, whether entered in the order-book or not. The provisions of §§8308, 8311 Burns 1894, §§6220b, 6211 Horner 1897, in regard to verified complaints, have no application when the accused is charged with a crime by indictment or affidavit and information.

It is insisted by appellant that the commitment signed by the judge of the Huntington Circuit Court says that "the supposed charge upon which his son was sent to the reform school was made March 23, 1900, and therefore there was no connection between such charge and the indictment for larceny to which a plea of guilty had been entered six months before". Even if this was true, such recital would not overcome the other facts to the contrary, which clearly appear

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from the record. The commitment, however, states that the accused was brought before the judge of said court on March 23, 1900, but it does not state when the charge of larceny was made against him. The record shows only one charge of larceny against appellant's son, and that by indictment to which he entered a plea of guilty, and it is clear from the record that he was committed to the reform school for boys on that indictment.

During the progress of the trial appellant offered to prove by a witness that said witness was present in the court room on March 23, 1900, when appellant's son was committed to the reform school for boys, and that at that time "no written charge for larceny, or any other offense, was made or filed against him, or read to him, either by affidavit and information or by indictment, nor was any such charge or charges made, presented, or filed near such date." The court excluded said evidence. Such evidence was immaterial for the reason that the power of the court to commit appellant's son did not depend upon the charge against him being preferred, made, or filed on or about or near March 23, 1900, or upon the same being read over to him on that day. The court had jurisdiction to commit him on the indictment for larceny although the same was returned by the grand jury, and the plea of guilty entered thereto at the September term, 1899, of said court. It follows that no error was committed in excluding said evidence.

This proceeding by appellant is a collateral attack on the order of the Huntington Circuit Court committing his son to the reform school for boys, and can not succeed unless that order is absolutely void. *Lowery v. Howard*, 103 Ind. 440, 443; *McLaughlin v. Etchison*, 127 Ind. 474, 476, 22 Am. St. 658; *Holderman v. Thompson*, 105 Ind. 112, 115; *Willis v. Bayles*, 105 Ind. 363, 371; *Turner v. Conkey*, 132 Ind. 248, 32 Am. St. 251, 17 L. R. A. 509; *Bruce v. Osgood*, 154 Ind. 375; *Helms v. Bell*, 155 Ind. 502. This case can not, therefore, be used for the correction of mere errors or

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irregularities in the criminal case against his son, but, to entitle him to recover, he must show, not that said order was erroneous or irregular, but that it was absolutely void. *Willis v. Bayles*, 105 Ind. 363, 371.

As the Huntington Circuit Court had full and complete jurisdiction of the criminal case against the accused and of his person, the order was not void.

Judgment affirmed.

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 WESTERN UNION TELEGRAPH COMPANY v. HENLEY ET AL.

[No. 19,632. Filed May 28, 1901.]

157	90
158	616

**TELEGRAPH COMPANIES.—*Failure to Transmit Message.—Allegation as to Payment of Charges.***—Where in an action against a telegraph company for damages for failure to transmit a message plaintiff alleged that it had an arrangement and agreement with defendant whereby defendant undertook to transmit plaintiff's message, as paid, by charging the usual rate to plaintiff's account, which plaintiff paid at the end of each month, it was not necessary to allege that the account had been paid before the action was commenced. *pp. 91, 92.*

**SAME.—*Failure to Transmit Message.—Revenue Stamp.—Pleading.***—A complaint against a telegraph company for failure to transmit a message is not bad for failing to allege that a revenue stamp was attached to the message and canceled in accordance with the revenue law, where it was alleged that defendant accepted the message and undertook to deliver it, since such defense need not be anticipated in the complaint. *pp. 92, 93.*

**SAME.—*Failure to Transmit Message.—Nature of Telegram.—Damages.***—A telegraph message "Is stonework on building finished? Wire answer to-day. Henley Stone Company", sufficiently informed the telegraph company of the nature of the information desired to sustain a judgment against the telegraph company for the expense of sending a messenger to obtain the information requested by the telegram. *p. 93.*

**SAME.—*Failure to Transmit Message.—Stipulation as to Repetition of Message.***—A stipulation on a telegraph blank to the effect that the company should not be liable for mistakes, delay or nondelivery of an unrepeatd message beyond the amount received for transmission is unavailable as a defense to an action for failure to transmit, where the repetition would not have prevented the default complained of. *pp. 93, 94.*

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Western Union Tel. Co. v. Henley.

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From Monroe Circuit Court; *W. H. Martin*, Judge.

Action by Henry Henley and others against the Western Union Telegraph Company for failure to transmit message. From a judgment for plaintiffs, defendant appeals. *Affirmed.*

*S. N. Chambers, S. O. Pickens, C. W. Moores, G. H. Fearons, T. J. Loudon and J. H. Loudon*, for appellant.

*J. E. Henley and J. B. Wilson*, for appellees.

BAKER, J.—Appellees, partners under the name of the Henley Stone Company, gave to appellant's agent at Bloomington, Indiana, the following message for transmission to V. N. May at South Bend, Indiana: "Is stonework on building finished? Wire answer to-day. Henley Stone Company." Appellees recovered judgment for \$100 penalty under §§5511, 5512 Burns 1894, §§4176, 4176a Horner 1897. Under an additional paragraph of complaint, they also had judgment for \$20 actual damages for expenses in sending one of the members of the firm to South Bend to see about the completion of the stonework on the building. The errors assigned challenge the correctness of the rulings on demurrers to the complaint and answers, on appellant's motion for judgment on the jury's answers to interrogatories notwithstanding the general verdict, and on the motion for a new trial.

The same points are presented in regard to the constitutionality and construction of the penalty statute that were decided adversely to appellant in *Western Union Tel. Co. v. Ferguson*, ante., 37.

The complaint avers that appellees had an arrangement and agreement with appellant whereby appellant undertook to transmit appellees' messages as paid by charging the usual rate to appellees' account which appellees paid at the end of each month; and that, under this arrangement, appellant received and undertook to transmit the message in question, and charged the usual rate to appellees' account. Section

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5511 requires appellant to receive and transmit messages "upon the usual terms". The complaint shows that the usual terms were complied with so far as rates were concerned. Appellant had the right to exact cash in advance,—and also the right to waive it. If appellant elected to accept business on credit, there arose the same duties that follow cash payment. There was no occasion for appellees to allege that the account had been paid before the action was commenced. If they had paid the amount, they could have recovered it in this action. And if appellant had earned the money under the contract, appellant would have had a valid cause of action against appellees,—just what was contracted for.

The complaint is said to be insufficient because it fails to allege that a revenue stamp was attached to the message and canceled. Section 7 of the revenue law of 1898 makes it the duty of the sender of a telegraphic message to attach and cancel a revenue stamp, under penalty of a fine of not more than \$100. Section 18 forbids telegraph companies to send a message to which no stamp is attached, under penalty of a fine of not more than \$10. The complaint avers that appellees tendered the message to appellant for transmission, and that appellant accepted the message and undertook to deliver it and did transmit it to its agent at South Bend, where the default occurred. In an action on a debt, plaintiff need not aver that the debt was not contracted on Sunday, that it did not arise from gambling, or from the sale of the plaintiff's vote, or the like. Nor should it be necessary for appellees to plead not guilty until they are charged with a violation of the penal laws of the United States. The averment that appellant accepted the message for transmission was a sufficient statement that the message was proper to be accepted. And if appellant had answered that the message when accepted was not duly stamped (waiving the sufficiency of such an answer), appellees might have fully replied that appellant agreed for pay to attach and cancel the stamp for ap-



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pellees. It was not incumbent upon appellees to anticipate such a defense. *Smith v. Hunter*, 33 Ind. 106; *Wallace v. Cravens*, 34 Ind. 534; *Prather v. Zulauf*, 38 Ind. 155; *Campbell v. Wilcox*, 10 Wall. 421, 19 L. Ed. 973; *Miller v. Henderson*, 24 Ark. 344; *Hallock v. Jaudin*, 34 Cal. 167; *Grand v. Cox*, 24 La. Ann. 462; *Trull v. Moulton*, 12 Allen (Mass.) 396; *Cabbott v. Radford*, 17 Minn. 320; *Hale v. Wilkinson*, 21 Gratt. (Va.) 75; *Jones v. Davis*, 22 Wis. 421. The holding in *Kirk v. Western Union Tel. Co.*, 90 Fed. 809, that the sender of a message must allege in his complaint that he attached and canceled a revenue stamp, does not commend itself to us as a correct rule of pleading.

Against the sufficiency of the paragraph of complaint for actual damages, it is pointed out that no averment is made that appellant was informed of the purpose and importance of the message otherwise than by its contents. The message read: "Is stonework on building finished? Wire answer to-day. Henley Stone Company." The damages alleged were the expenses of a trip to South Bend to get the information asked for in the telegram. The message informed appellant that appellees were engaged in the stone business, that they were interested in the progress of the stonework on a building in South Bend, and that they desired immediate information on the state of the work. It is unnecessary to consider what damages appellant might have been liable for if appellees had failed to get the information. Appellees saved appellant that question by getting the information through other sources. The cost thereof was a damage that resulted naturally from appellant's default and was of a nature to be foreseen as a probable consequence of appellant's failure to act as a means of communication. *Croswell on Law of Electricity* §§617, 618; *Thompson on Law of Electricity* §§310, 366-368.

The second paragraph of answer set out a stipulation in the contract on the telegraph blank to the effect that appellant should not be liable for mistakes, delay or non-delivery

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of an unrepeatd message beyond the amount received for transmission. If the limitation is of any worth whatever, it will afford no protection if the repetition of the message would have been unavailing to prevent the default complained of. Thompson on Law of Electricity §228 *et seq.* The message in this case was never delivered by the receiving agent. How could this have been prevented by paying appellant to have the receiving agent repeat the message to the transmitting agent? The demurrer was properly sustained.

The fourth and fifth answers count on the rules of the company which require prepayment. These answers were no defense to the complaint, which alleged a waiver of the rules.

In the sixth answer appellant averred that it had no notice of the purpose and importance of the message other than was furnished by its contents. The face of the message was enough.

The assignments on the motion for judgment on the jury's answers to interrogatories, and on the motion for a new trial, only present again the questions that have been decided in relation to the pleadings.

Judgment affirmed.

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WILLIAMS v. THE STATE.

[No. 19,539. Filed June 4, 1901.]

**CRIMINAL LAW.—Appeal.—Jury Trial.—Presumption.**—It will be conclusively presumed on appeal that the trial judge had a legal reason for refusing a jury trial to one charged with a crime, where the record does not show the grounds of refusal and no bill of exceptions is incorporated. *p. 95.*

**APPEAL AND ERROR.—Record.—Affidavits.**—An affidavit in support of a motion for a new trial, which affidavit is not authenticated by the signature of the trial judge, and not brought into the record by bill of exceptions, will not be considered on appeal. *p. 95.*

From Madison Circuit Court; *John F. McClure*, Judge.

From a conviction of larceny, defendant appeals. *Affirmed.*

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Williams v. State.

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*D. L. Bishopp and J. R. Thornburgh*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

HADLEY, J.—Appellant was convicted of petit larceny. He complains that he was denied the right of trial by jury. The record recites that on the 24th day of November, the cause, by agreement of counsel, was set down for trial by the court on November 26th; that on November 26th “the defendant now demands a trial by jury” which was overruled, and the cause submitted to the court for trial.

To sustain his appeal it is required of appellant to bring to this court a record which affirmatively shows that prejudicial error has been committed against him. *Campbell v. State*, 148 Ind. 527; *Riley v. State*, 149 Ind. 48; *Lillard v. State*, 151 Ind. 322.

There is no bill of exceptions in the record. What the clerk recites is all we know about the facts constituting the refusal complained of. The recitals sufficiently show that the court had at least some reason for denying the jury trial, and in the absence of a showing to the contrary we must conclusively presume that it had a legal reason. The code (§641 Burns 1894, §629 R. S. 1881 and Horner 1897) provides that when the record does not otherwise show the decision or ground of objection thereto, the party objecting must present to the judge a proper bill of exceptions, which, when approved by the judge and filed, shall become a part of the record. That has not been done in this case. The motion for a new trial is copied into the transcript, and an affidavit in support thereof, but the affidavit not having been authenticated by the signature of the trial judge and brought into the record as prescribed by law, it will be disregarded by this court. *Hauser v. Roth*, 37 Ind. 89; *Naanes v. State*, 143 Ind. 299; *Graybeal v. State*, 145 Ind. 623; *Illinois, etc., R. Co. v. Cheek*, 152 Ind. 663; *Oats v. State*, 153 Ind. 436.

Judgment affirmed.

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State, *ex rel.*, v. Board, etc.

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THE STATE, EX REL. FADLEY, DRAINAGE COMMISSIONER,  
v. BOARD OF COMMISSIONERS OF HENRY  
COUNTY, ET AL.

[No. 19,541. Filed June 4, 1901.]

**MANDAMUS.**—*Dredging of Water Course.—Removal of Bridges by County Commissioners.*—Mandamus will not lie, at the suit of the drainage commissioner, against the county commissioners and township trustees to compel them, at public expense, to remove iron bridges over a water course in the county, in order that the contractor appointed by the drainage commissioner to construct the ditch may proceed with the work, though the necessary dredging machines can neither pass under nor around the bridges.

From Henry Circuit Court; *W. O. Barnard*, Judge.

Mandamus by the State on the relation of the drainage commissioner of Henry county, against the board of commissioners of Henry county. From a judgment for defendants, relator appeals. *Affirmed.*

*Adolph Rogers*, for appellant.

*M. E. Forkner* and *G. D. Forkner*, for appellees.

JORDAN, J.—Petition by the State on the relation of Henry Fadley, commissioner of drainage of Henry county, Indiana, for a writ of mandamus to compel the board of commissioners and certain township trustees, appellees herein, to remove iron bridges which had been constructed over Blue river, a water course in said county. The defendants recovered judgment on their separate demurrers to the petition. From this judgment the relator appeals, and his sole contention is that under the facts alleged in the petition he is entitled to be awarded a writ of mandamus against appellees for the purpose above mentioned.

The following facts, among others, are averred in the petition: In September, 1899, certain resident freeholders of Henry county, Indiana, petitioned the circuit court of that county to establish a public ditch under and in pursu-

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State, *ex rel.*, v. Board, etc.

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ance of §§5623, 5624, *et seq.* Burns 1894. Such proceedings were had in said cause that the matter involved was, as provided by the statute, referred to the commissioner of drainage, the relator herein, who, together with the county surveyor and a certain other disinterested and reputable freeholder of that county, appointed by the court as a third commissioner, made a personal inspection of the lands described in the drainage petition, and also of other lands likely to be affected by the construction of the proposed drain, and thereupon said commissioners made a favorable report to the court and therein assessed benefits to each separate tract of land and also against the roads of railroad companies and against certain free gravel roads and public highways. Said report, together with the assessments of benefits of the lands and easements as therein provided, was approved and confirmed by the court, and the ditch was ordered to be established and constructed as located and provided in the report of the commissioners. The course or route of said improvement as located extends for a distance of more than fifteen miles along and in the channel of Blue river, which is alleged to be an ancient water course and non-navigable stream flowing through Henry county. It further appears that some three separate gravel roads which are free public highways, together with some fourteen other public roads, were each separately assessed as benefited by the construction of the proposed drain. As a part of the aforesaid highways and roads certain iron bridges had been constructed by the board of commissioners of that county in conjunction with certain township trustees. On the 20th day of July, 1900, the relator herein, as such drainage commissioner in said proceeding, entered into a written contract with one Boyer for the construction of said drain as established by the court's order. Under this contract, it is disclosed that the relator, as such commissioner, expressly relieved the contractor from any and all expenses and duty

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*State, ex rel., v. Board, etc.*

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of removing the bridges in question. It is further alleged that the drainage of said river can only be accomplished by means of a dredging machine placed on a boat to be floated on the river, and that it will be impossible for any dredging machine suitable and necessary to perform the work of dredging in said stream to pass under or around any of said bridges. It is averred that the contractor is ready with his boat and dredging machine to begin work in said river, and, in order for him to construct the ditch as established by the court, it is necessary that the aforesaid bridges spanning said river, and connected as parts of said public highways, be removed, in order to allow the boat and dredging machine to move down the stream and excavate therein according to the plans and specifications relating to the construction of the ditch. It is alleged that the relator has demanded of the defendants that they and each of them at once proceed to remove said bridges in order that the contractor may proceed in the construction of the improvement in question, all of which they each refuse to do. The prayer of the petition is that the court compel the defendants by mandate to comply with the relator's demand.

The question presented is: Are the facts as stated in the petition sufficient to authorize the court, at the instance of the relator, to coerce by mandate the board of commissioners, or any of said township trustees, to remove, at the expense of the public, the bridges in dispute, in order to enable the contractor to proceed in the construction of the ditch as established by the court under the statute mentioned.

Section 1182 Burns 1894, §1168 Horner 1897, which is a part of the civil code pertaining to writs of mandate, provides: "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station." We are not aware of any statute which, under the circumstances in this case, either expressly or impliedly makes it the official duty of

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State, *ex rel.*, v. Board, etc.

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any of the appellees to remove the bridges in controversy, upon the demand of the relator. It can not in reason be asserted that because some of the respective duties enjoined upon the appellees pertain to public highways, that, therefore, the duty of removing the bridges in dispute must necessarily result from the official positions which they occupy. It is true that it has been held under the decisions of this court that the board of county commissioners may be compelled by mandate to repair a bridge which is a part of or essential to a public highway when such bridge has become dangerous, and also may be compelled to rebuild one connected with a public highway when it has been destroyed. *Board, etc., v. State, ex rel.*, 113 Ind. 179, and cases there cited. But the rule as declared in the case mentioned has no application whatever under the facts in this appeal.

The statute by the authority of which the drain in question was ordered to be constructed fixes the duty and declares the powers of the commissioner of drainage, and it must be apparent that the relator as such commissioner is not shown, under the law when applied to the facts in this case, to possess such authority as will permit him to maintain this action. After giving the required notice, the drainage commissioner is by the statute authorized to let the construction of the ditch to the lowest and best bidder. §5626 Burns 1894. In this case, however, for some reason, it appears it was stipulated in the contract that the contractor should be relieved of the expenses and duty of removing these bridges. But conceding, without deciding, that the relator had the authority to embrace such a stipulation in the contract, he certainly by so doing could not cast the burden or duty upon appellees, or either of them, of removing the bridges at the expense of the public. The mere fact that the highways of which the bridges were essential parts may have been assessed with benefits in the drainage proceedings would not make it the duty of appellees, or any of them, to remove these bridges. If their removal became necessary in order to

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State, *ex rel.*, v. Board, etc.

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enable the contractor successfully to carry out his contract, it certainly was no more the duty of the board of commissioners or township trustees to incur the expense of their removal than it would have been to cause the removal of trees or other obstructions along the course or route of the proposed drain. Counsel for appellant relies, in support of his contention, upon the decision of this court in the case of *Lake Erie, etc., R. Co. v. Cluggish*, 143 Ind. 347. In that case the commissioner of drainage, together with the contractor, sought to enjoin the railroad company from interfering with or preventing them from removing a bent supporting a bridge belonging to the railroad company. It was not contended in that appeal that the company should remove the bent and open the bridge at its own expense in order to accommodate the contractor in dredging in or along the stream spanned by the railroad bridge. No question of that character was presented or decided in that cause. The claim of the drainage commissioner and the contractor was that they had the right in the construction of the drain to go through the bridge, and whatever damages resulted therefrom to the railroad company must be considered as satisfied by reason of a certain reduction which had been made in the amount of benefits assessed against the company in the proceedings to establish the ditch. The question presented and decided on the facts in that appeal and the one here involved are materially different, and consequently that decision lends no support to appellant's contention.

The petition does not state a cause of action against appellees, or either of them, therefore the demurrer of each was properly sustained.

Judgment affirmed.



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Green v. State.

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## GREEN v. THE STATE.

[No. 19,542. Filed June 4, 1901.]

**CRIMINAL LAW.**—*Pleading.*—*Conspiracy to Commit a Felony.*—In pleading a conspiracy to commit a felony, the elements of the intended felony must be fully disclosed, so that the court may see that a public offense has been committed. *p. 102.*

**BLACKMAILING.**—*Gist of the Offense.*—The gist of the felony defined as blackmailing is the extortion of money, chattels, or valuable securities from a person by threatening to expose his crimes or immoralities. *p. 102.*

**SAME.**—*Indictment.*—An indictment for conspiracy to blackmail which fails to allege the ownership of the property, or explain the absence of such averment, is insufficient. *pp. 102, 103.*

From Henry Circuit Court; *W. O. Barnard*, Judge.

From a conviction for conspiracy to blackmail, defendant appeals. *Reversed.*

*W. A. Brown, M. E. Forkner, G. D. Forkner and H. H. Evans*, for appellant.

*W. L. Taylor*, Attorney-General, and *W. R. Steele*, for State.

**BAKER, J.**—Appellant was convicted of conspiracy to blackmail. The error assigned is the overruling of her motion to quash the information.

The information charged that Alice Green (and others) on, etc., at, etc., “did then and there unlawfully and feloniously conspire, confederate and agree to and with each other to unlawfully and feloniously charge and accuse one William W. Southard of certain immoral conduct, which, if true, would tend to disgrace him and bring him into ridicule and contempt of society, to wit, to charge and accuse him of having upon divers occasions had illicit sexual intercourse with one Rose Green, a female, who was then and there pregnant with a bastard child, and to unlawfully and feloniously accuse him of being the father of said bastard child, with the intent then and there and thereby to extort

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Green v. State.

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from the said William W. Southard money, chattels and valuable securities, the kind, character and value of which money and valuable securities are unknown.”

So much of the conspiracy and blackmailing statutes as need be considered, read: “Any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony \* \* \* shall, upon conviction thereof, be fined \* \* \* and imprisoned in the state prison \* \* \*.” §2260 Burns 1894, §2139 R. S. 1881 and Horner 1897: “Whoever \* \* \* accuses or threatens to accuse \* \* \* any person \* \* \* of any immoral conduct, which, if true, would tend to degrade and disgrace such person, or in any way to subject him to the ridicule or contempt of society, \* \* \* with intent to extort or gain from such person any chattel, money, or valuable security, \* \* \* is guilty of blackmailing, and shall, on conviction thereof, be imprisoned in the state prison \* \* \*.” §1999 Burns 1894, §1926 R. S. 1881 and Horner 1897.

In pleading a conspiracy to commit a felony, the elements of the intended felony must be fully disclosed, so that the court may see that a public offense is in fact charged. *Landringham v. State*, 49 Ind. 186; *State v. McKinstry*, 50 Ind. 465; *Scudder v. State*, 62 Ind. 13; *Miller v. State*, 79 Ind. 198; *Smith v. State*, 93 Ind. 67; *McKee v. State*, 111 Ind. 378; *Musgrave v. State*, 133 Ind. 297; *Barnhart v. State*, 154 Ind. 177.

The gist of the felony defined as blackmailing is the extortion of money, chattels or valuable securities from a person by threatening to expose his crimes or immoralities. It is a method by which the criminal obtains the property of his victim. The end is the same as in larceny, embezzlement, robbery, burglary, or false pretenses; but the means employed are different. In *State v. Miller*, 153 Ind. 229, an indictment for obtaining money by false pretenses was held to be bad for failure to state the ownership of the money

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obtained. That is, false pretenses by which one recovers possession of his own, are not within the statute. *People v. Thomas*, 3 Hill 169. Nor can one be guilty of larceny, nor of burglary, with respect to his own property, of which he has the right of possession. *Barnhart v. State*, 154 Ind. 177. As blackmailing belongs to the same general class of crimes, the indictment must allege the ownership of the property or explain the absence of the averment. *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791; *People v. Griffin*, 2 Barb. 427. The information in the present case is defective in this particular, and probably in others.

Judgment reversed, with instructions to sustain the motion to quash the information.

GARRIGUS v. BOARD OF COMMISSIONERS OF HOWARD  
COUNTY ET AL.

[No. 19,119. Filed June 5, 1901.]

157	103
164	597
s164	606
s164	607
s164	608

COUNTIES.—*Records.—Employment of Expert Accountants.—Order.—*

*Public Necessity.*—An order of the board of county commissioners employing expert accountants to examine the county records and collect such sums of money as might be found due the county, which states that in the judgment of the board an indispensable public necessity exists for the employment of such experts, is sufficient under §7853 Burns 1894, without stating the facts constituting the necessity. pp. 107, 108.

SAME.—*Statutes.—Repeal.*—Section 7853 Burns 1894, forbidding the allowance of claims for services to be paid by commission or percentage, is not repealed by the act of 1891 fixing the compensation and prescribing the duties of certain State and county officers (Acts 1891, pp. 424-452). p. 108.

SAME.—*Statutes.—Constitutional Law.*—Section 89 of the act of 1879 (§7853 Burns 1894), relative to extra allowances by the board of county commissioners is not unconstitutional in that its subject is not embraced in the title of the act. pp. 108, 109.

SAME.—*Contracts.—Employment of Expert Accountants to Examine Records.*—The board of county commissioners has both statutory and inherent power to enter into contracts for the employment of persons to discover and collect money and property due the county which are wrongfully withheld from it, or which have been lost or misapplied through mistake, negligence, or fraud. pp. 109, 110.

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COUNTIES.—*Employment of Expert Accountants to Examine Records.*

—The employment of expert accountants to examine the county records for the purpose of discovering and collecting claims due the county is not a delegation of the official powers and duties belonging to the board, where it is shown that the work could be accomplished only by long, laborious, and careful search by experts. *p. 110.*

SAME.—*Expert Accountants.—Recovery of Claims Due County.—*

*Compensation.*—A county cannot evade liability to expert accountants in discovering and collecting claims due the county on the ground that they recovered more than it was entitled to receive, where the county accepted and retained the amount recovered. *pp. 110, 111.*

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Action by Milton Garrigus against the board of county commissioners to recover for services of expert accountants in examination of certain public records. From a judgment for defendants, plaintiff appeals. *Reversed.*

*M. Bell, W. C. Purdum, F. E. Gavin, T. P. Davis, J. L. Gavin, G. Shirts* and *W. R. Fertig*, for appellant.

*J. C. Blacklidge, C. C. Shirley* and *C. Wolf*, for appellees.

DOWLING, J.—This was an action upon an agreement in writing made by the board of commissioners of Howard county with two expert accountants for services to be performed by the latter in the examination of certain public records and accounts, and the collection of such sums of money as might be found due to the county. The suit was commenced in the Howard Circuit Court, and the venue was changed to the county of Hamilton. The board filed a demurrer to the complaint for want of facts, and it was sustained. Error is assigned upon this decision.

The material allegations of the complaint were these: Errors were supposed to exist in the records, vouchers, and settlement sheets in the office of the auditor of Howard county, and in other public offices; by reason of such errors, mistakes, and omissions, large sums of money were, in fact, due to Howard county; the existence of such errors could be ascertained only by careful search by skilled experts; no

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officer of the board or county possessed the requisite skill for such investigation. Fleener and Hunter were expert accountants, and were qualified to make the necessary examinations.

At the regular June term, 1893, of said board, Fleener and Hunter made a written proposition to said board whereby they offered to perform said work and to collect such moneys as might be found due to the county, without cost to the county, and to pay the same into the county treasury; for these services they were to receive a sum equal to one-half the amount collected and paid in; this proposition was accepted by the board, and its record stated that an indispensable public necessity existed for the employment of the said expert accountants. As a part of the same order, the auditor was directed to issue warrants on the treasurer for all sums becoming due to them under said employment. Fleener and Hunter proceeded to make the proposed investigation, and, after great labor and expense, discovered divers errors and omissions which had resulted in loss to the county; these errors and omissions were, through the exertions of the experts, corrected and supplied, and the moneys discovered by the accountants to be due to the county in consequence of such errors and omissions were by them collected and paid into the county treasury; all of the conditions of said contract to be performed by the said Fleener and Hunter were performed by them, and they became entitled to \$2,021.81 with interest thereon, for their services. In pursuance of said contract, the auditor of said county drew his warrant in favor of said Fleener and Hunter for \$1,277.09 being a part of the amount to which they were entitled; afterwards, the appellant, who was such auditor, for the reason that no claim for said sum had been first filed with him and presented to the board for allowance, repaid the said sum to the county on demand of the county, and the said Fleener and Hunter by their written assignment transferred all of their claim under their said agreement to the appellant.

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Fleener and Hunter were made defendants, and filed their answer admitting all of the allegations of the complaint.

The particular sections of the statutes necessary to be considered are these: "Section 39. The board of county commissioners shall, unless in cases of indispensable public necessity, to be found and entered of record as part of its orders, make no allowance not specifically required by law to any county auditor, clerk, sheriff, assessor or treasurer, either directly or indirectly, or to any clerk, deputy, bailiff or any employe of such officer; nor shall they, except in cases above provided, employ any person to perform any duty required by law of any officer, or for any duty to be paid by commission or percentage. For a violation of these provisions, each member of such board favoring the same shall be guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than double nor more than five times the amount of such allowance, to which may be added imprisonment in the county jail for any period not more than sixty days, and the office of such commissioner shall be declared forfeited. If it be found necessary, and so entered of record, to employ any person to render any service as contemplated in this section, as a public necessity, the contract for such employment shall be spread of record in said court; and, for such services rendered, the claimant shall file his account in said court ten days before the beginning of the term, and any taxpayer shall have the right to contest the claim." Acts 1879, s. s., pp. 130, 142, §39; §5766 R. S. 1881; §7853 Burns 1894. "Such commissioners shall be considered a body corporate and politic by the name and style of 'The board of commissioners of the county of——'; and as such, and in such name, may prosecute and defend suits, and have all other duties, rights and powers incident to corporations, not inconsistent with the provisions of this act." §7820 Burns 1894, §5735 R. S. 1881. "Such commissioners, in their respective counties, shall have power at their meetings: First. To make orders re-

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specting the property of the county, in conformity to law;  
\* \* \* and to take care of and preserve such property.  
\* \* \* Third. To audit the accounts of all officers having the care, management, collection or disbursement of any moneys belonging to the county or appropriated for its benefit. Fourth. To perform all other duties that may be enjoined on them by any law of this State.” §7830 Burns 1894, §5745 R. S. 1881.

The first ground upon which the sufficiency of the complaint is denied is that the facts constituting the “indispensable public necessity”, mentioned in the statute, were not found and entered of record as a part of the order of the board. The facts out of which the supposed indispensable necessity arose fully appeared in the proposition of the experts which was spread upon the record, and constituted a part of the entry in the proceeding. The order of the board then recites that, in the judgment of the board, “it would be to the interests of the county to accept the same (the written proposition of F. and H.), and that an indispensable public necessity exists for the employment of an expert accountant to examine the books, vouchers, and settlements in the various offices of Howard county,” etc. This statement of the necessity for such employment and allowance, we think, was sufficient. The statute does not say that the facts constituting the necessity shall be shown. The Constitution of this State, §28, article 4, declares that “No act shall take effect until the same shall have been published and circulated in the several counties of this State by authority, except in case of emergency; which emergency shall be declared in the preamble, or in the body of the law.” This requirement has always been supposed to be properly complied with by a statement in the preamble or body of the act that “Whereas an emergency exists for the immediate taking effect of this act, therefore, the same shall take effect from and after its passage.” The language of §39, *supra*, certainly requires no more particular statement of the “in-

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dispensable necessity" than does the Constitution of the emergency upon the declaration of which the taking effect of a statute is made to depend.

It is next objected that §39, *supra*, was repealed by the act of 1891 (Acts 1891, pp. 424-452, §137). The title of the act of 1891 is: "An act fixing the compensation and prescribing the duties of certain State and county officers, and providing penalties for the violation of its provisions." Its last section (137) is in these words: "All laws and parts of laws *in conflict with this act* are hereby repealed *to the extent of such conflict*." The later act contains no provision corresponding to §39 of the act of 1879, or relating to the same subject-matter. We are unable to discover a conflict between §39 of the act of 1879 and any of the provisions of the act of 1891. There is, therefore, so far as we can discover, neither an express repeal of §39 by the act of 1891, nor a repeal by implication. Section 39 of the act of 1879 contains provisions which are not found in the act of 1891, but which are entirely consistent with the purposes of the later statute, and which are essential to the protection of the interests of the counties of this State. If read in connection with the act of 1891, §39, *supra*, seems to supply an omission in the former act. The repealing clause of the act of 1891 appears to have been carefully framed, and is special and not general. We find in the later statute no evidence of an intention on the part of the legislature to repeal §39 of the act of 1879.

The validity of §39, *supra*, is also assailed on the ground that it is unconstitutional for the reason that its subject is not embraced in the title of the act of which it is a part, nor properly connected therewith, as required by §4, article 19, of the Constitution of this State.

The subject of the act of 1879 is fees, salaries, and the compensation of officers and other persons for services rendered to the public. The title of the act, so far as the same need be set out, is as follows: "An act fixing certain fees



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to be taxed in the offices, and the salaries of officers named therein; providing for certain employes in certain public offices, and fixing their compensation; defining certain duties and liabilities of officers and persons therein named;" etc.

As the negligence or dishonesty of officers, resulting in defects, omissions, or false entries in the public records, and the consequent loss of public funds, or other property, might render the employment of expert accountants, or other agents, indispensably necessary to the protection of the public interests, a provision for the employment and compensation of such agents and accountants was germane to the subject of the act. *Henderson v. State, ex rel.*, 137 Ind. 552, 559, 24 L. R. A. 469. In the absence of statutory regulations imposing on the successors of such delinquent officers the duty of completing their work, such successors could not be expected to discharge those duties which should have been performed by their predecessors in office. The power to contract for such services so conferred by the act in question is to be somewhat strictly construed, but the agreement sued upon is not invalid for any of the reasons given in *Board, etc., v. Mitchell*, 131 Ind. 370, 374, 15 L. R. A. 520.

It is next contended that if §39, *supra*, is invalid, the board had no authority, either inherent or statutory, to enter into the agreement in question. We hold that §39, *supra*, is valid, and that it was in force when the agreement with Fleener and Hunter was made; but even if we are in error in this, it will be found that this court has accorded to the county board very full powers to enter into contracts for the benefit of the property of the county, and that these powers were amply sufficient for the purposes of the agreement with Fleener and Hunter. §5745 R. S. 1881, §7830 Burns 1894; *Hoffman v. Board, etc.*, 96 Ind. 84; *Board, etc., v. Mitchell*, 131 Ind. 370.

In its administrative character, the board of commissioners has powers and duties, both inherent and statutory, with reference to the property and revenues of the county,

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which are of the highest importance to the public welfare. One of the most obvious of these is the duty to discover and collect all moneys and property belonging to the county which are wrongfully withheld from it, or which have been lost, or misapplied, through mistake, negligence, or fraud. *Duncan v. Board, etc.*, 101 Ind. 403; *Board, etc., v. Mitchell*, 131 Ind. 370; *Board, etc., v. Gardner*, 155 Ind. 165.

The objection that the work to be performed by Fleener and Hunter was a part of the official duty of the board, and that the board could not delegate the performance of this duty to others, is earnestly pressed upon our attention.

The complaint averred that "the existence of these claims, and each item thereof, could be ascertained only by long, laborious, and careful search of experts." Such a search was not that of "auditing accounts of officers", which the statute imposed upon the board. It was plainly a duty the board could not perform, but one which, from its nature, must be committed to others. The employment of the expert accountants for the purposes named in the agreement did not involve any abandonment or delegation of the official powers and duties of the board. The proceedings of the accountants were at all times subject to the supervision and control of the board, and the persons so employed were mere agents and servants of the county.

Again, counsel for appellee contend that the complaint is bad because it appears from its allegations that the sum collected from the State by Fleener and Hunter was in excess of the amount justly due. As the county accepted, and yet retains, the amount so collected, it cannot evade its liability to its agents on the pretext that they recovered for it more than it was entitled to receive. Besides, this objection, if valid, goes only to a part of the appellant's claim, and, if allowed, would not render the complaint bad.

The last point made by counsel for appellee is that the terms of the agreement, by which Fleener and Hunter were to receive fifty per cent. of the amounts recovered, were un-

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fair and unconscionable. If the work undertaken by the experts was as difficult and tedious as the complaint alleges and as the demurrer admits, it cannot be said that the contingent compensation provided for by the contract was unfair, or out of proportion to the nature and amount of the services to be rendered. The total amount recovered was not great, and none of the reasons upon which the contracts referred to in the cases cited by appellee were held invalid applies to the agreement before us. In our opinion, the complaint was sufficient.

Judgment reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings in conformity herewith.

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THE COLLIERY ENGINEER COMPANY v. THE AMERICAN  
CAR AND FOUNDRY COMPANY ET AL.

[No. 19,484. Filed June 5, 1901.]

**APPEAL AND ERROR.**—*Action Begun Before Justice of the Peace.*—

The fact that the constitutionality of a statute is involved does not render an action begun before a justice of the peace in which the amount in controversy does not exceed \$50 appealable to the Supreme or Appellate Court under the exception in §644 Burns 1894 relative to appeals, as such exception applies to ordinances of municipal corporations.

From Clark Circuit Court; *J. K. Marsh*, Judge.

Appeal from judgment in action originating before a justice of the peace involving the constitutionality of a statute where the amount in controversy was \$1. *Appeal dismissed.*

*J. W. Fortune, A. G. Smith and C. A. Korbly*, for appellant.

*M. Z. Stannard*, for appellees.

MONKS, C. J.—This is an action for the recovery of money only, and originated before a justice of the peace. The amount in controversy, exclusive of interest and cost,

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is \$1. It is conceded by the parties that the right of recovery depends upon the constitutionality of a statute. The appeal to this court was perfected August 3, 1900. The right of appeal in this State is statutory. Elliott's App. Proc., §77; Ewbank's Manual, §§81, 88. Our code of civil procedure provides that "Appeals may be taken from the circuit courts and superior courts to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed \$50: Provided, however, That this exception shall not apply to prohibit an appeal in cases originating before a justice of the peace or mayor of a city, involving the validity of an ordinance passed by an incorporated town or city." §644 Burns 1894, §632 R. S. 1881 and Horner 1897.

By the second clause of §1336 Burns 1894, §6562a Horner 1897, the Appellate Court was given jurisdiction of all appeals from judgments rendered in cases which originated before a justice of the peace, in which the amount in controversy, exclusive of interest and cost, exceeds \$50. Said section also provides that the Appellate Court shall not have jurisdiction of any case where the constitutionality of a statute, federal or State, or the validity of an ordinance of a municipal corporation, is in question, and such question is duly presented. It is clear that the jurisdiction of this appeal was not in the Appellate Court.

As the action is for the recovery of money only, and the amount in controversy, exclusive of interest and cost, does not exceed \$50, and the validity of an ordinance of an incorporated town and city is not involved, the same was not appealable under the laws of the State. §644 (632) *supra*; *Winfield v. Wise*, 73 Ind. 71, 73; *Bosworth v. Wayne Pike Co.*, 101 Ind. 175; *Louisville, etc., R. Co. v. Coyle*, 85 Ind. 516; *Cincinnati, etc., R. Co. v. McDade*, 111 Ind. 23; *Town of North Manchester v. Oustal*, 132 Ind. 8; *Cow-*

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*ley v. Town of Rushville*, 60 Ind. 327; *Quigley v. City of Aurora*, 50 Ind. 28, and cases cited; *Clinton Tp. v. De Haven*, 22 Ind. App. 280; *City of Greensburg v. Cleveland, etc., R. Co.*, 23 Ind. App. 141; *Griffie v. Town of Summitville*, 10 Ind. App. 332; *Lake Erie, etc., R. Co. v. Yard*, 8 Ind. App. 199; *Duckworth v. Mosier*, 4 Ind. App. 267; *Ewbank's Manual*, §89.

The fact that the constitutionality of a statute may be involved is immaterial, for the reason that no provision was made in the proviso of said §644 (632), *supra*, for the appeal of cases originating before a justice of the peace or mayor of a city, involving the constitutionality of a statute, where the amount in controversy exclusive of interest and cost did not exceed \$50, as there is for cases involving the validity of ordinances of municipal corporations.

As the statute makes no provision for an appeal in a case such as this, this court has no jurisdiction of the appeal.

Appeal dismissed.

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THE STATE v. KIRK.

[No. 19,500. Filed June 7, 1901.]

**CRIMINAL LAW.**—*Bill of Exceptions.*—*Time of Filing.*—*Appeal and Error.*—When time is given beyond the term within which to file bill of exceptions in a criminal case, it must be granted before or at the time of the rendition of the judgment.

From Clay Circuit Court; *S. M. McGregor*, Judge.

Prosecution of Albert E. Kirk for forgery. From a judgment of acquittal the State appeals. *Affirmed.*

*J. M. Rowley*, *E. S. Holliday*, *Rowland Evans* and *W. L. Taylor*, Attorney-General, for State.

*G. A. Knight* and *A. W. Knight*, for appellee.

**MONKS, C. J.**—Appellee was charged by affidavit and information with the crime of forgery. At the conclusion of

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the evidence, the jury, by direction of the court, returned a verdict of not guilty. On October 18, 1899, a judgment of acquittal was rendered on said verdict. On November 1, 1899, several days after the rendition of the judgment on the verdict, the court "granted sixty days' time in which to file bills of exception." Within the sixty days, and in vacation, a bill of exceptions was presented to and signed by the trial judge, and on the same day filed in the clerk's office.

It is settled law in this State under §1916 Burns 1894, §1847 R. S. 1881 and Horner 1897, that in criminal cases if time is given beyond the term within which to file bills of exceptions, it must be granted before or at the rendition of the judgment. *Ewbank's Manual*, §33, p. 45; *Hotsenpiller v. State*, 144 Ind. 9; *Bruce v. State*, 141 Ind. 464; *Guenther v. State*, 141 Ind. 593, 594, 595; *Barnaby v. State*, 106 Ind. 539; *Hunter v. State*, 101 Ind. 406. It follows, therefore, that the bill of exceptions filed in vacation is not in the record, and can not be considered.

As appellant relies upon the matters set forth in said bill of exceptions to sustain the assignment of errors, it is clear that there is nothing in the record to support the same. The appeal is not sustained.

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CURRIER v. THE STATE.

[No. 19,581. Filed June 18, 1901.]

**CRIMINAL LAW.—Larceny.**—In a prosecution for larceny the evidence showed that defendant contracted with a plumbing company to furnish and lay certain steam pipes upon the express condition that defendant should first secure the company by the execution of his promissory notes for the contract price, with surety. When the pipe arrived at the depot the company authorized defendant to haul it on his wagon to his farm and deposit it there for their use. Upon the refusal of defendant to execute the notes the company demanded the pipe, a part of which was hidden by defendant, and which he refused to surrender unless the company would pay certain expenses. *Held*, that the concealment of the property by defendant, and his refusal to return it except upon the payment of a fictitious and fraudulent claim, constituted a felonious taking and appropriation, and was larceny, under the statute. *pp. 115-119.*

157	114
165	476

157	114
169	563

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**TRIAL.—Misconduct of Counsel.—Practice.**—Available error cannot be predicated upon the misconduct of counsel in the argument of the case where no objection was made at the time, and no motion was made to set aside the submission and withdraw the case from the jury. *p. 119.*

**CRIMINAL LAW.—Indeterminate Sentence Law.—Instructions.—Definition of Larceny.**—In defining grand larceny in an instruction to the jury the court is not required, under the indeterminate sentence law, to state the penalty for such offense, since the jury has nothing to do with the penalty. *pp. 119, 120.*

From Elkhart Circuit Court; *J. D. Ferrall*, Judge.

William W. Currier was convicted of grand larceny, and appeals. *Affirmed.*

*J. S. Dodge* and *J. S. Dodge, Jr.*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

**DOWLING, J.**—The appellant was convicted upon an indictment for grand larceny. He contends that there was no evidence of his guilt, and that his request for a peremptory instruction to the jury directing his acquittal should have been sustained. The facts proved were these: The prosecuting witnesses, Charles H. Maloney and Edward Collins, co-partners, were plumbers engaged in business in the city of Elkhart, Elkhart county, Indiana. The appellant was the owner of a greenhouse in the same county. About November 1, 1900, he spoke to Maloney & Collins in regard to a change in the heating appliances in his greenhouse, and the substitution of pipes three inches in diameter for the one-inch pipe then in use. Maloney & Collins offered to furnish the new pipe, and to put it in place for about \$450, but upon the express condition that the appellant should first secure them in the contract by the execution of his promissory notes for \$40 each, maturing monthly, to the full amount of the contract price of the pipe, and the work of putting it in place, with one Lehman as surety. Appellant assented to this proposition, and Maloney & Collins ordered 1,000 feet of three-inch pipe from a Chicago house. Some

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twenty days later, when the pipe arrived at the railroad depot at the city of Elkhart, they authorized the appellant to haul it on his wagon to his farm and to deposit it there for their use, which he did. Before proceeding further, Maloney & Collins demanded the execution of the notes with the security promised. The appellant at first said that Lehman was out of the city. Afterwards, on being pressed by the prosecuting witnesses, he declared that Lehman was not worth anything. Maloney & Collins, however, expressed their willingness to accept Lehman as surety on the notes. The appellant then said that he did not agree to give Lehman as his surety, but that Maloney & Collins were to put in the pipe, and that it was to remain their property until paid for. The prosecuting witnesses told him they had not made that agreement, and did not do business that way. On Saturday evening, appellant said to Maloney & Collins: "I've got a notion to make you a proposition. I've a notion to tell you that you will have to pay me \$50 damages if you don't start this job." One of the firm said to him: "We will be out Monday morning to get the pipe if you don't furnish the notes properly secured." The notes not having been executed according to the contract, Maloney & Collins went to appellant's farm on the following Monday to remove their pipe, but found only sixty feet of it. They then procured a search-warrant, and returned to the farm in company with the constable. They saw wagon tracks leading into a field some 100 rods distant from appellant's barn, and, following the tracks, they discovered 260 feet of their pipe hidden in the tall grass and weeds in the field. Maloney & Collins left a man to watch the pipe, and returned the next morning to take it away. Appellant, in the meantime, had put up a sign on the fence inclosing the field with this inscription upon it: "No one allowed to trespass on this property." While Maloney & Collins were looking for the pipe, and before they had discovered it, the appellant said to them that the matter could be settled, and he would return the re-



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mainder of the pipe if they would connect up the old pipe in the greenhouse (which had been detached), or pay some \$7 for the expense of connecting it. He also said that he had hidden the pipe, and had carried it so far away that it would cost him \$3 to get it back. Maloney & Collins declined this offer. The constable told appellant he would give him until the next day to return the pipe. Appellant laughed at this, but said he would go to the store and see the firm that evening. He failed to do so. It was proved that appellant stated to one Roy DeCamp that he had some trouble with Maloney & Collins in getting them to carry out their contract, and that he had taken the pipe as a means of protecting himself, and to make them do their job; that he meant to keep the pipe until he brought them to terms; that if he did not succeed, they would never see the pipe again; and that he would put it where they couldn't find it. He asked this witness how long pipe would stay under water without spoiling. To another witness he said: "I took it [the pipe] over in the field, and I want them to replevin it."

About one month elapsed from the time the pipe was hauled from the depot to appellant's farm until Maloney & Collins went out to get it and bring it to their store. The quantity taken to the farm was 1,000 feet, which was worth \$300. The quantity discovered and taken back by the prosecuting witnesses was 640 feet, of the value of \$192. The portion never found, and totally lost to the prosecuting witnesses, was 360 feet, worth \$108. It was shown that Maloney & Collins, at the request of the appellant, had sent one of their men to the greenhouse to disconnect the old pipe; but this was no part of their contract, the appellant having undertaken to detach and remove the old pipe.

The claim is made on behalf of the appellant that he took the property honestly under a claim of a right to its possession. It is impossible to adopt this view. Neither the title to the pipe, nor the right of possession, was vested in the appellant. True, the pipe was deposited on his land, but it

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was there as the property of Maloney & Collins. It was there just as a box of their tools might have been. By the express terms of the contract, and as a condition precedent, the appellant was to make the prosecuting witnesses safe by the execution of his promissory notes for the contract price, with Lehman as his surety. After procuring the pipe, the firm refused to proceed a single step until this condition was complied with. Having broken his agreement without excuse, and after putting the prosecuting witnesses to great expense and inconvenience, the appellant made a groundless claim against them, the pretext for depriving them of their property. He fraudulently appropriated and then concealed it. Through the instrumentality of an officer and a search-warrant, a part of the property was recovered. A considerable portion was never found, and its owners were permanently deprived of it. The wrongful appropriation and concealment of the property by the appellant, in the absence of its owners, and without their consent, and the refusal of the appellant to return it, except upon the payment by the prosecuting witnesses of a fictitious and fraudulent claim, constituted a felonious taking and appropriation, and was larceny under the statute. According to the appellant's own confession, he intended to compel the owners of the property to settle with him *on his own terms*, to pay a claim they did not owe, or to perform work they were under no obligation to perform, or lose their property.

The case readily falls within the well recognized rules relating to the crime of larceny. "The mere delivery of property to another for a special purpose vests in the person receiving it only the temporary charge or custody; the possession of the property remains in the owner, and a conversion of it is larceny." "So, a delivery of property on condition of immediate payment does not transfer the right of possession to such property until the performance of the condition, and if the receiver wrongfully retain it without making payment, with felonious intent, he is guilty

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of larceny." "To constitute the crime of larceny a felonious intent is, as a general rule, an indispensable ingredient; \* \* \*. This intent must have been either to appropriate the property to the use and benefit of the taker, though he need not necessarily dispose of it, to establish such intent, or to wholly and permanently deprive the owner of it; and taking property with intent to conceal it for the purpose of inducing the owner to offer a reward for its return, and to obtain the reward, is sufficient to constitute the crime." 12 Am. & Eng. Ency of Law (1st ed.), 768, 769, 776, 777; *State v. Anderson*, 25 Minn. 66, 33 Am. Rep. 455; *Robinson v. State*, 113 Ind. 510; *Davis v. State*, 10 Lea (Tenn.) 707; *State v. Homes*, 17 Mo. 379, 57 Am. Dec. 269, and notes; *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506; *Best v. State*, 155 Ind. 46; *Stilwell v. State*, 155 Ind. 552.

It is not a defense to a charge of larceny that the defendant had "an impression" that he had a claim to the property taken; this is not equivalent to an "honest belief." *Miller v. State*, 77 Ala. 71. Where the taking in the first instance is a trespass, the subsequent appropriation is a felony. *Regina v. Riley*, 14 Eng. Law & Eq. 544. Whether the appellant took and appropriated the pipe with a felonious intent was a question for the jury. Under the authorities, the proof was amply sufficient to authorize the conclusion that the property was so taken. *Morningstar v. State*, 55 Ala. 148; *Johnson v. State*, 73 Ala. 523.

The alleged misconduct of counsel for the State on the final argument of the case was one of the grounds upon which a new trial was demanded. So far as the record shows, no objections to the supposed statements of counsel were made at the time, nor was there a motion to set aside the submission, and to withdraw the case from the jury. Under these circumstances, no question as to such misconduct is presented to this court. *Blume v. State*, 154 Ind. 343.

The remaining errors discussed by counsel relate to in-

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structions given and refused. In stating to the jury the statutory definition of grand larceny, the court was not required to say what the penalty for that offense was. The jury could only find by their verdict whether the appellant was guilty or not guilty as charged, and whether he was under thirty years of age. They had nothing to do with the penalty for the crime.

The modification of instruction numbered six, tendered by appellant, by striking therefrom the words "Larceny is something more than mere trespass", did not constitute reversible error. Full and clear definitions of the crime with which the appellant was charged were given, and the jury were properly instructed as to the difference between a mere trespass and the crime of larceny.

The peremptory instruction for a verdict of not guilty demanded by the appellant was properly refused. We find no error in the record. Judgment affirmed. Baker, J., took no part in this decision.

## HARRIS ET AL. v. RANDOLPH COUNTY BANK.

[No. 19,008. Filed June 19, 1901.]

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157 120  
163 116

**BANKS AND BANKING.—***Authority of Bank President to Assign Note.*

—*Presumption.*—Where a note is assigned by a bank president as collateral security for a debt due another bank, such assignment will be presumed to be binding on the bank until it is shown that the same was not authorized or ratified by its directors. *pp. 127, 128.*

**SAME.—***Authority of Bank President to Assign Note.—Pleading.*—

Where a note is assigned on behalf of a bank by its president, and, in an action thereon it is desired to present an issue in regard to the authority of the bank president to make the assignment, it must be done by verified plea, as provided by §367 Burns 1894. *pp. 128, 129.*

**APPEAL.—***Harmless Error.*—The sustaining of a demurrer to certain paragraphs of answer is harmless, where each answer was but the equivalent of a general denial. *p. 129.*

**SAME.—***Harmless Error.*—The sustaining of a demurrer, when a motion to strike out is the proper remedy, is harmless, where the correct result was reached. *p. 129.*

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**BILLS AND NOTES.**—*Assignment of Note as Collateral Security.*—*Insolvency.*—*Preferences.*—Where a loan is made upon agreement that the debtor is to assign certain notes as collateral security, an assignment of the notes in pursuance of such agreement, but after the debtor became insolvent, is not void, as being in violation of §2984 Burns 1894, which provides against the preference of one creditor to another. pp. 126, 130-132.

**SET-OFF.**—*When Improper.*—Where a debtor assigned a note to plaintiff as security for a loan, such debtor is in no position to file a set-off against plaintiff's cause of action on the note, where recovery is sought from the original makers only. pp. 132-136.

**SAME.**—*When Improperly Pleaded.*—Suit was brought by a bank on a note alleged to have been received as collateral security from another bank. The latter bank was made a party defendant along with the original makers against whom judgment was demanded. *Held*, that a cross-complaint by defendant bank, alleging that plaintiff had wrongfully taken possession of the note, and converted same to its own use, sounds in tort, and cannot be pleaded as a set-off. pp. 132-136.

**COUNTERCLAIM.**—*Insufficiency of Cross-Complaint.*—A cross-complaint is insufficient as a counterclaim which contains no averments, or otherwise shows, that the transaction alleged therein was connected with or arose out of the same cause of action on which the plaintiff bases his complaint. p. 136.

**APPEAL.**—*Harmless Error.*—Alleged erroneous rulings of the trial court will not be considered on appeal where the legitimate evidence is sufficient to sustain a judgment, and the merits of the cause under the issues have been fairly tried. p. 138.

**BANKS AND BANKING.**—*Power of Banks to Borrow Money.*—*Insolvency.*—A bank may borrow money in the prosecution of its business, and secure the payment thereof by collaterals or otherwise, and the fact that such bank is insolvent at the time does not deprive the bank of the right to negotiate the loan and secure the payment thereof, unless it is forbidden by statute. p. 140.

From Randolph Circuit Court; J. W. Headington, Judge.

Action by the Randolph County Bank against William Harris and another on a note executed by the latter to the Citizens Bank and assigned to plaintiff, and to foreclose a mortgage. From a judgment in favor of plaintiff, Jesse Canaday, receiver of the Citizens Bank, who had been made a party, defendant appeals. *Affirmed.*

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*J. W. Thompson, J. W. Ryan and W. A. Thompson, for appellants.*

*J. J. Cheney, J. W. Macy, J. P. Goodrich, J. S. Engle and W. G. Parry, for appellee.*

JORDAN, J.—The Randolph County Bank, of Winchester, Indiana, as plaintiff, sued William Harris and Eneas H. Turpen to recover a personal judgment against them upon a promissory note for \$3,000 executed by them to the Citizens Bank of Union City, Indiana, and to foreclose a mortgage upon certain real estate in said county executed to said bank by said parties and their respective wives to secure the payment of the note in suit. Appellant Jesse Canaday, who had previously been appointed receiver of the Citizens Bank, an insolvent institution, and other persons who, along with said receiver, claimed to have and hold liens upon the mortgaged premises, were made party defendants, and expressly challenged, by each paragraph of the complaint, to answer as to any liens or interests which they had or held against said premises. All of the defendants, except Canaday, the receiver of the Citizens Bank, were defaulted. He alone appeals, and assigns that the court committed the following errors: (1) Overruling his demurrer to the complaint; (2) in striking out and rejecting his cross-complaint; (3) in sustaining the demurrer of appellee to the second and fourth paragraphs of his answer; (4) overruling his demurrer to the second paragraph of appellee's reply to the third paragraph of answer; (5) overruling his motion for a new trial.

The complaint is in two paragraphs. The first paragraph, among other things, after alleging that the plaintiff is an incorporated bank, sets out the execution of the note and mortgage by Harris & Turpen, and that said note was properly indorsed by the said Citizens Bank by N. Cadwallader, president, to the plaintiff as collateral security to secure the payment of \$5,000, which latter sum is alleged to be now due and unpaid. It is further charged that the makers of the

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note in suit have failed to pay the same, and that it is now due and unpaid, and judgment is demanded against said makers for the sum of \$4,000, and for a foreclosure of the mortgage against all of the defendants. Copies of the note and mortgage are filed with and made parts of each paragraph of the complaint, and each of the paragraphs discloses that permission has been obtained from the court by the plaintiff to make said receiver a party defendant to this action.

The second paragraph alleges the execution of the note and mortgage in suit by Harris & Turpen to the Citizens Bank, and then alleges that on March 2, 1896, the plaintiff, the Randolph County Bank, loaned to said Citizens Bank the sum of \$5,000, and received from said bank as evidence of said loan the following, to wit: "The Citizens Bank. Union City, Indiana, March 2, 1896. \$5,000. Randolph County Bank, Winchester, Indiana, has deposited in this bank \$5,000, payable to the order of itself sixty days (in current funds) after date, with no per cent. interest per annum only for the time stated on return of this certificate properly indorsed. C. H. Cadwallader, Cashier." This certificate is indorsed as follows: "We hereby guarantee the payment of this certificate." (Signed) C. H. Cadwallader, Nathan Cadwallader.

It is further alleged that at the time said loan of \$5,000 was negotiated and made by the plaintiff to the Citizens Bank, that the latter by its officers and agents, in order to induce plaintiff to make said loan, promised and agreed with plaintiff to turn over and deposit with it as collateral and additional security for the payment of said loan the note and mortgage in suit, together with other notes, as such collateral security, at any time when the plaintiff should request the said Citizens Bank to do so. It is then averred that after making said loan to the Citizens Bank that the latter, upon request of plaintiff, did turn over and assign and indorse to plaintiff as collateral security upon said loan the

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note and mortgage in suit, together with other notes which plaintiff now holds as such security. That at the time said notes were assigned to plaintiff it was agreed that the time for paying the loan of \$5,000 should be extended until the money from the collaterals so assigned could be collected and applied in payment upon the loan. It is further alleged that the note and mortgage sued upon were assigned to plaintiff by said Citizens Bank by indorsement, in pursuance of the agreement heretofore mentioned, etc., and that the note in suit and the loan in question are averred to be due and unpaid, and judgment is demanded against Harris & Turpen for \$5,000 and foreclosure of the mortgage against all of the defendants.

Appellant as receiver of the Citizens Bank demurred to each paragraph of the complaint upon the ground that neither stated facts sufficient to constitute a cause of action against him as defendant in said suit. His demurrer was overruled, to which ruling he excepted, and, thereupon, he filed an answer in four paragraphs, the first being the general denial. Each of the other three paragraphs was addressed to the complaint generally, and not specially to either of its paragraphs. Appellant also filed what is denominated a cross-complaint, consisting of four paragraphs, which cross-complaint, upon motion of appellee, was stricken out and rejected in its entirety over the objections and exceptions of appellant. Appellee demurred for insufficiency of facts to the second, third, and fourth paragraphs of the answer, and its demurrer was sustained to the second and fourth and overruled to the third. Thereupon appellee replied in two paragraphs to the third paragraph of appellant's answer, the first being a general denial. The demurrer to the second paragraph of reply was overruled. Upon the pleadings as they stood after the several rulings of the court as heretofore stated, the issues were joined between appellant and appellee and a trial by the court resulted in a finding in favor of appellee to the effect that it was entitled to recover



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against Harris & Turpen upon the note in suit in the sum of \$3,703.95 and to foreclose the mortgage against all of the defendants. The court further finds that appellee held the note and mortgage involved in this action as collateral security to secure the payment of a debt owing to it by the said Citizens Bank, which indebtedness is evidenced by a certificate of deposit; that a part of said indebtedness has been paid from other collaterals, leaving a remainder due to appellee of \$1,496.24, which amount, the court finds, together with \$242 allowed as attorneys fees, together with costs and interest accruing subsequent to the rendition of the judgment, should be paid to the appellee out of the first money collected on the judgment to be rendered upon said note and mortgage. The residue thereof to be paid to appellant as receiver of the Citizens Bank, or to whomsoever may be entitled to receive the same. Over appellant's motion for a new trial, judgment was rendered in accordance with the court's finding.

The second paragraph of appellant's answer, after alleging the appointment of appellant as receiver of the Citizens Bank and the acceptance by him of said trust, and that said bank was organized and incorporated under the laws of this State as a bank of discount and deposit, then avers, among other things, that said Citizens Bank, for a long time prior to its suspension and the appointment of said receiver, was an insolvent institution, and was the owner of a large number of bills and notes, including the mortgage note in suit; that on May 6, 1896, the bank suspended and ceased to do business and soon thereafter passed into the hands of appellant as receiver; that on the 27th day of April, 1896, while the bank was in an insolvent condition, the president thereof, Nathan Cadwallader, without any authority from the board of directors, and without any authority whatever, transferred and assigned to appellee the note in suit, together with other notes and bills of said bank, by indorsing upon each the name of the said Citizens Bank; that the assign-

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ment of said notes was made as collateral security for the purpose of securing the payment of said deposit of \$5,000 made by appellee; that it was agreed by and between appellee and said Cadwallader at the time the notes were assigned and delivered to the former that all of the proceeds arising from the collection thereof, over and above what was necessary to pay the \$5,000 deposit, should be paid over to the Citizens Bank for its benefit. It is then alleged that no part of the proceeds of the notes so assigned has been paid over to said bank by appellee, and the further averment is made that appellee has not and never did have any valid title to the notes in question in this action. The paragraph closes with a denial of all other matters contained in the complaint.

The third paragraph of answer proceeds upon the theory that after the Citizens Bank had become insolvent, Cadwallader, its president, by the assignment of the note in suit, along with the other notes mentioned as a security for the \$5,000 deposit, thereupon preferred appellee over the other creditors of the Citizens Bank, in violation of §2934 Burns 1894, §2697 Horner 1897, the same being a part of the law under which the Citizens Bank was organized. This section reads as follows: "All transfers of notes, bonds, bills of exchange, and other evidences of debt owing to any association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion or other valuable thing to its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets to the proper payment of its just liabilities, or with a view to the preference of one creditor to another—shall be utterly null and void."

The fourth paragraph of the answer in the main may be said to be similar to the second. It, among other things, alleges that appellee on March 2, 1896, deposited with the

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Citizens Bank \$5,000, and as evidence of such deposit the certificate set out in the second paragraph of the complaint was issued; that on April 27, 1896, Cadwallader, the president of the bank, indorsed, assigned, and transferred to appellee, without any consideration, certain notes and bills belonging to the Citizens Bank, including the note involved, for the purpose of securing the deposit of said \$5,000 so made by appellee. It is then expressly alleged that Cadwallader as president of the Citizens Bank had no authority whatever from the board of directors to assign and transfer these notes to appellee for the said purpose. None of the paragraphs of appellant's answer is verified.

It appears, as previously stated, that appellant as receiver of the Citizens Bank is made a party defendant by appellee in this action to answer in respect to liens and interests which he claimed to have and hold in and against the mortgaged premises. It was not the purpose of the complaint to enforce the collection of the note against him. Appellee under its complaint only sought to recover a personal judgment against the makers of the note, and to enforce the foreclosure of its mortgage. The certificate of deposit in no manner entered into or forms any part of the foundation of this action. Appellant contends that there is an insufficiency of facts as against his demurrer in each paragraph of the complaint, for the reason that there are no averments therein showing the right of the appellee to maintain this action.

The first paragraph of the complaint alleges that "said note was heretofore properly indorsed" to plaintiff by said Citizens Bank by N. Cadwallader, president, as collateral security, etc. The second paragraph avers that "said Citizens Bank did assign, indorse, deliver, and turn over to the plaintiff as collateral security", etc. The makers of the note were party defendants to this action, but they did not see fit to appear and demur to the complaint for insufficiency of facts, or because of any defect of party defendants, and ap-

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pellant is the only party complaining as to the insufficiency of the assignment of the note in suit. The averments of the complaint in regard to such assignment and transfer of the note to appellee as collateral security certainly made a *prima facie* case to the effect that appellee was the legal holder and owner of the note as against appellant. Under the averments of the pleading it is made to appear that the note in question was, by the Citizens Bank, transferred, by indorsement, to appellee, through the agency of the bank's president. As the directors of the bank possessed the power to authorize the president to assign or transfer the note to appellee for the purpose for which it *was* assigned, or subsequently to have ratified the same if unauthorized, such assignment, under the circumstances, will be presumed to be binding on the bank, until it is shown that the same was not authorized or ratified by its directors. *National State Bank v. Vigo Nat. Bank*, 141 Ind. 352, 50 Am. St. 330, and cases there cited. *First Nat. Bank v. New*, 146 Ind. 411; *Hawkins v. Fourth Nat. Bank*, 150 Ind. 117.

We conclude that each paragraph of the complaint was sufficient, so far as appellant was concerned, to require him to answer in respect to the assignment of the note in suit, or in regard to any interest or lien which he had or held upon the mortgaged premises, and therefore the court did not err in overruling the demurrer to each paragraph of the complaint.

When the second and fourth paragraphs of appellant's answer are stripped of surplusage matter, it becomes evident that the theory or gist of the defense attempted to be interposed by each is that the transfer or assignment of the mortgage note upon which appellee sought to recover was of no effect in passing to appellee any right or title to said note and mortgage, for the reason that the president of the Citizens Bank had no power or authority to make the assignment or transfer in question in behalf of said bank. Each of these paragraphs, under the facts therein alleged, was

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nothing more than an unverified answer or plea of *non est factum* in respect to the assignment of the note by the bank, as referred to in the complaint. Section 115 of the civil code, §367 Burns 1894, provides: "Where a pleading is founded on a written instrument, or such instrument is therein referred to; or when an assignment, in writing, of such instrument is specially alleged in a pleading, such instrument or assignment may be read in evidence on the trial of the cause without proving its execution, unless its execution be denied by pleading under oath, or by an affidavit filed with the pleading denying the execution."

If appellant desired to present an issue in regard to the authority or power of the president of the Citizens Bank to make an assignment or transfer of the note in suit, he was required by virtue of the above provisions of the code to do so by a verified plea. *Vannoy v. Duprez*, 72 Ind. 26; *Lassiter v. Jackman*, 88 Ind. 118; *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202; *Allen v. Studebaker, etc., Co.*, 152 Ind. 406; *Ralston v. Moore*, 105 Ind. 243.

These unverified paragraphs of the answer were each but the equivalent of the general denial so far as they attempted to controvert the assignment of the note as alleged in the complaint, and as the general denial remains as a part of the answer, the action of the court, under the circumstances, in sustaining the demurrer to each was harmless, for the reason that if they had been permitted to remain as a part of the answer they would have cast no other or additional burden on the appellee than rested upon it under appellant's general denial. *Ralston v. Moore, supra*; *Allen v. Studebaker etc., Co., supra*.

It is true that a demurrer is not the proper method of assailing an unverified plea of *non est factum*, but as a correct result was reached through the demurrer instead of a motion to strike out and reject the paragraphs in dispute, therefore, the question of procedure, under the circumstances, is of no importance.

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The second paragraph of the reply to the third paragraph of appellant's answer, to which he unsuccessfully demurred, gives a history of the execution of the note and mortgage, and then the paragraph proceeds to allege the following facts: That at the time the loan in question was made by appellee the said Citizens Bank, through its officers and agents, in order to induce appellee to make said loan to it, promised and agreed to and with the appellee to turn over, assign, and deposit with the latter, when the appellee should require such assignment to be made, as collateral security for the payment of the said loan of \$5,000, the notes and bills referred to and set out in the third paragraph of answer, including the note in suit. By this agreement and promise, upon which appellee relied, it made the loan in question to the Citizens Bank, and the said notes and mortgage were assigned and turned over by the Citizens Bank at the request of appellee, in pursuance of said agreement, before the maturity of the loan of \$5,000, as collateral security to secure the payment of said loan; that at the time said note and mortgage in suit and the other notes were assigned and turned over to plaintiff, in pursuance of said agreement, as collateral security, it was agreed by and between the appellee and the Citizens Bank that the time of the payment of the loan of \$5,000 should be extended, until such time as said collaterals could be collected and the proceeds thereof applied in the discharge of said loan. It was further agreed that the appellee should collect the collaterals, and apply the proceeds thereof, as fast as collected, to the discharge and satisfaction of the said loan and all interest thereon owing by said Citizens Bank, and the residue of the proceeds of said collaterals, if any, should be turned over by the appellee to the Citizens Bank; that said note and mortgage in suit and the other collaterals were assigned and delivered by indorsement to appellee by the Citizens Bank pursuant to and in compliance with the aforesaid agreement and promise herein mentioned. It is then averred that the appellee now

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has in its possession and is the owner in its own right of the said mortgage note and other collaterals for the purposes aforesaid. That said loan of \$5,000 remains due and unpaid except as to credits thereon given, and that the note set out in this action is the same note so assigned and transferred to appellee as such collateral security and is held by it for such purpose, and that the amount due thereon is not sufficient to pay and satisfy the said \$5,000 which the said Citizens Bank received and still holds and which was borrowed upon the credit and promise of the assignment to it of said collaterals, etc. It is apparent that the part of this paragraph of the reply which sets out the original promise of appellant's bank under and by which, as alleged, appellee was induced to make the loan of \$5,000 is but a repetition of that part of the second paragraph of the complaint wherein the same matter is embraced. Strictly speaking it was not essential that appellee should have presented such matter by its complaint, as the same could be more properly pleaded in avoidance of the defense interposed under the third paragraph of the answer whereby, as we have seen, the title and right of appellee to the note in suit is sought to be impeached or defeated for the alleged reason that the transfer or assignment of the note was made in violation of the provisions of the section of the statute previously set out. If the facts stated in the paragraph in question are true, and this the demurrer concedes, they are certainly sufficient to place the assignment and transfer of the note to appellee beyond the inhibition of this statute, and thereby avoid the defense set up in the third paragraph of the answer. This paragraph of the reply discloses that the Citizens Bank obtained the \$5,000 under and through its promise and agreement made at the time it received the money that it would assign and transfer to appellee collaterals to secure the payment of said loan. That after the money on the loan was received by appellant's bank, but before the maturity of the loan, the latter bank, in pursuance of its promise and agreement, as-



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signed and transferred to appellee the notes and bills referred to and set out in the third paragraph of the answer, among which was included the mortgage note in suit, all of which, as it appears, were assigned to appellee as collaterals to secure the payment of the loan in question. These facts disclose that appellant's bank, by the assignment and transfer to appellee of the note in suit, was simply performing that which it had agreed and obligated itself to do in order to induce appellee, in the first instance, to loan it the money. The promise or agreement to assign these notes as collaterals was made before appellee had actually become a creditor of the Citizens Bank, hence the action of the latter in assigning and transferring these collaterals to appellee in no sense can be said to be or have resulted in an unlawful preference within the meaning of the statute, although the Citizens Bank was insolvent at the time the collaterals were assigned. By this action of the bank, under the circumstances, there was no attempt on its part to prefer appellee as a creditor over others. The bank was simply carrying out its promise and obligation, by which it in the first instance induced appellee to become its creditor. Again, if we take an equitable view of this feature of the case, it may be asserted that the assignment and transfer of the notes, under all of the circumstances, ought to be regarded as though the same had been actually made for the purpose of securing said loan at the time the money was obtained from the bank, for the reason that "equity regards and treats that as done which in good conscience ought to have been done." 1 Pomeroy's Eq., §364, *et seq.*, to §377. The case of *Brighton v. White*, 128 Ind. 320, in no sense, under the facts, lends any support to appellant's contention. It follows that the court did not err in overruling the demurrer to the second paragraph of the reply.

Appellant next contends that the court erred in rejecting and striking out his cross-complaint, which consisted of four paragraphs. Appellee, however, insists (1) that neither



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paragraph of this pleading embraces matters which can be properly pleaded as a set-off; (2) that they can not be considered or regarded as a counterclaim for the reason that the subject-matter embraced in each is not disclosed to have any connection with or to arise out of the cause of action set forth in appellee's complaint. We give a summary or gist of each of these paragraphs. The first alleges that appellee wrongfully and unlawfully took possession of a large number of promissory notes and bills receivable which belonged to the Citizens Bank, and wrongfully and unlawfully converted the same to its own use, and refuses to account therefor. A list of the notes and bills so converted is given in this paragraph. There are no averments, however, to disclose that the transaction about which appellant complains is connected with or arises out of the cause of action upon which appellee bases its complaint. The paragraph closes with a demand for judgment for \$8,000 as damages against appellee for the alleged unlawful conversion of the notes and bills. The second paragraph avers that appellee is indebted to appellant's bank in the sum of \$8,000 for money had and received, and demands judgment against appellee for that amount. Neither the first nor the second paragraph seeks to set up the matters therein contained as a set-off against appellee. For aught appearing to the contrary, both of these paragraphs may be viewed and considered as an attempt upon the part of appellant to present and recover upon a cause of action independently of that set out in the original complaint. The third paragraph, among other things, alleges the organization of appellant's bank, its failure and suspension on May 6, 1896, and his appointment as its receiver. It alleges that on March 2, 1896, prior to its suspension, appellee deposited \$5,000 with said bank and received a certificate of deposit as the evidence thereof. That on April 27th following, the president of appellant's bank, one Nathan Cadwallader, turned over and transferred to appellee, as collaterals, notes and bills receivable belonging to

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said bank and of the value of \$8,000, to secure to appellee the payment of said \$5,000 deposit. It then proceeds to allege that said president had no authority from the directors of his bank to transfer and assign said notes and bills, and that therefore appellee acquired no title or right thereto. It is further averred that appellant has demanded of appellee that it turn over and surrender to him the notes and bills in question, all of which it refuses to do, and that it has collected the money due on part of said notes and bills, and has converted the same, together with the notes and bills remaining uncollected, to its own use, and judgment is demanded for the unlawful conversion. There is nothing averred in this paragraph to disclose that the subject-matter thereof has any connection with appellee's cause of action, or with the transaction out of which it arose.

As we previously stated, the subject of the cause of action set out in the original complaint is not the certificate of deposit, but the note and mortgage therein embraced. The theory of this paragraph is to the effect that appellee acquired no title to the notes and bills so transferred to it by the president of appellant's bank; that it has unlawfully converted said notes and a part of the proceeds thereof to its own use, and that, therefore, appellant is entitled to recover against it for the alleged conversion of the notes and the money collected thereon.

The facts averred in the fourth paragraph are substantially the same as those set out in the third. It sets out facts in relation to the organization of appellant's bank and other facts in regard to its failure and suspension and the appointment of appellant as its receiver, etc. It then proceeds to charge that on the 2nd day of March, 1896, appellee deposited \$5,000 in the said bank and received a certificate of deposit as evidence thereof; that prior to the suspension of appellant's bank on April 27th following, the president thereof, one Nathan Cadwallader, delivered, turned over and assigned to appellee, as collateral security for the said de-

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posit, notes and bills belonging to the said bank, a list of such notes being given. The authority or right of the president to transfer such notes and bills to appellee is denied, and it is alleged that by reason of the unauthorized transfer and assignment that no title to the bills and notes passed to appellee. It is further alleged that appellee has collected a part of the notes and bills and has converted the money so collected to its own use and has also converted to its use such notes and bills as remain uncollected, and has refused on demand to turn over to appellant the money collected on the notes, or those thereof which remain uncollected. It avers that the note executed by the defendants Turpen and Harris was and is in the words and figures as follows: (Here copies of the note and mortgage are set out.) The paragraph closes with a demand for judgment for \$10,000 as damages against appellee, and for \$5,000 against Turpen and Harris, and a foreclosure of the mortgage. There are no positive averments in this paragraph to disclose that appellant disputes the title or ownership of appellee to the particular note and mortgage upon which the original cause of action is founded, and that he seeks for this reason to recover a judgment thereon in the place of appellee.

The principal purpose or theory of this paragraph seems to be to recover against appellee for the alleged conversion of the notes and bills. As to the standing of this paragraph as a counterclaim or cross-complaint, it may be said to be open to the same objections as the third, inasmuch as it does not disclose by any positive averments that the notes and bills turned over and transferred to appellee, and by the latter unlawfully converted to its own use, have any connection with the subject-matter of the original action, and therefore there is nothing, under the circumstances, upon which appellant can base any right to inject such matters into this action, and recover thereon, by way of counterclaim or cross-complaint. Appellant insists that the first and second paragraphs of his cross-complaint each presented a proper claim and demand by way of set-off against appel-

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lee, hence it is insisted that the court erred in striking out these paragraphs. The civil code in respect to a set-off provides: "A set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off." Section 351 Burns 1894, §348 Horner 1897. Even if it could be said that appellant was in a position to plead and enforce a set-off against appellee in this action, it appears that neither of said paragraphs professes to set up or allege matters by way of set-off. Under the circumstances in this case he was not in a position to enforce a set-off against appellee, for the reason that the latter, under its complaint, in no manner sought to recover on the note in suit against him, but only endeavored to recover against Turpen and Harris, the makers of the note. Appellee did not seek in any way to subject appellant to any liability upon the note or mortgage. It is evident, therefore, that he was not in an attitude to plead a set-off against appellee's cause of action.

Again, the first paragraph sounds in tort, and the rule is well settled in this State that a claim or demand arising out of tort can not be pleaded as a set-off against a cause of action arising out of contract. See cases collected in 1 Woolen's Procedure, §1999.

As the subject-matter of each of the paragraphs in question is not shown by averments therein to have any connection with or relation to the original cause of action they can not be maintained by way of counterclaim. The code defines the latter to be "any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages." §353 Burns 1894. Assuming that the facts and matters set out in the first and second paragraphs constitute a cause of action against appellee, still as it does not appear therein

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that such matters arise out of or are connected with the cause of action presented by appellee's complaint, therefore they can not be regarded or considered as a counterclaim. For the rule is well settled that the matters which are pleaded by a defendant as a counterclaim must be connected in a legal sense with the subject of the original action or with the transaction out of which it arose. *Sterne v. First Nat. Bank*, 79 Ind. 560; *Standley v. Northwestern, etc., Ins. Co.*, 95 Ind. 254, and cases there cited.

What we have said in regard to the first and second paragraphs applies to the third and fourth, and, therefore, as none of the paragraphs of the cross-complaint in question in any manner profess to answer appellee's complaint and as each seeks only to recover against appellee upon what is apparently an independent cause of action, the cross-complaint had no legitimate standing in the case, and it was not error for the court to reject or strike it out as an entirety on the motion of appellee. In passing upon the question here involved, we recognize the well settled rule that where objections to a pleading can apply merely to its insufficiency of material matters or facts to constitute a cause of action or defense, such pleading should be challenged by demurrer, and not by a motion to reject or strike it from the files. Even where the facts in a pleading are such only as to tend to constitute a cause of action or defense, the court, under such circumstances, is not justified in striking out or rejecting such pleading, for a motion to strike out can not perform the office of a demurrer. *Atkinson v. Wabash R. Co.*, 143 Ind. 501, and cases there cited.

Had appellant under the facts alleged in his fourth paragraph sought to dispute appellee's ownership or title to the mortgage note set out in the original complaint, and upon that theory sought affirmative relief against appellee and his codefendants, to the effect that the court adjudge upon his cross-demand that appellee had no title to said note by reason of its alleged unauthorized transfer and assignment, and

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that the title thereof was vested in him as the bank's receiver, and by proper averments of facts had sought to recover on the note in the place of appellee against the makers thereof, and for a foreclosure of the mortgage against all who were party defendants to such cross-pleading, the paragraph in question, under such circumstances, might be regarded as a proper counterclaim or cross-complaint, and if appellant as cross-complainant upon the trial had been successful upon the issue of title or ownership in respect to the note he might have been awarded a judgment thereon and a foreclosure of the mortgage securing the same, for the principle is well settled that in a suit by an assignee on a note to recover thereon, that another who claims to be the owner of such note, and entitled thereto, may interpose by way of a cross-complaint or counterclaim and contest with the plaintiff the title to the particular note in suit, and if such cross-complainant prevails upon such issue of ownership, he may be permitted under proper averments to recover instead of the plaintiff on the note against the makers thereof. Under such circumstances the counterclaim can be said to be based upon a matter connected with and involving the original cause of action, and all interested parties may be made defendants to such cross-complaint and brought before the court, and the whole controversy may be presented and determined. This is the rule asserted in *Kastner v. Pabilinski*, 96 Ind. 229.

Appellant complains of some intervening rulings in the proceeding during the trial in respect to the evidence, and also that the evidence is not sufficient to sustain the judgment of the court. We do not, however, consider these alleged rulings and determine if any of them is erroneous, for the reason that in our opinion it fully appears from the legitimate evidence in the record that the merits of this cause, under the issues, have been fairly tried and determined, and that appellant has received substantial justice, and a correct result has been reached. Consequently, under

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the circumstances, such rulings, even if erroneous, would be regarded as harmless, and not as reversible error. This rule is well affirmed by many decisions of this court, and is expressly recognized and asserted in §137 of the code, §401 Burns 1894. An examination of the evidence fully establishes that the appellee legally held the mortgage note in suit and was entitled to a judgment thereon and a decree foreclosing the mortgage. The evidence abundantly establishes that appellant's bank when it was still a going concern obtained through its authorized agents from appellee's bank \$5,000, for which it issued the certificate of deposit heretofore set out. It is shown to have obtained this money under a promise and agreement made by its duly authorized agent that it would assign and transfer to appellee the mortgage note in suit as collateral security to secure the payment of the \$5,000 so obtained. Appellant's bank is shown to have received this money from appellee upon the faith of its said promise and agreement so made, and said money was appropriated to the use of the bank, and thereafter, while the latter was still a going concern, and before the maturity of the loan or deposit in question, through its president, a duly accredited and authorized agent, it assigned and transferred to appellee the note in suit as such collateral security, under and in pursuance of said agreement. In no manner does it appear that the note in question was assigned by the bank to appellee on account of or for the purpose of preferring it as a creditor over any of the other creditors. The evidence upon this issue fully sustains the facts set up in appellee's reply to the third paragraph of the answer, and what we previously said in respect to the ruling of the court on the demurrer thereto need not be repeated.

Counsel for appellant has made an extensive argument and one replete with much research in regard to the question as to whether the money received by the bank from the appellee and evidenced by the certificate of deposit in controversy should be considered or treated as a loan or merely as



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a deposit. As to how it should be regarded in this respect, whether as a loan or a deposit, is not material under the facts in this case, for if it be considered as an ordinary deposit its effect would be to create the relation of debtor and creditor between appellee and appellant's bank. *Union Nat. Bank v. Citizens Bank*, 153 Ind. 44. That the certificate of deposit in this case may be viewed or regarded as a promissory note for the payment of money is well affirmed by the decisions of this court and by other authorities. *Gregg v. National Bank*, 87 Ind. 238, and cases there cited; *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87.

Appellant's bank, having received the money from appellee while a going concern in the prosecution of its business under and upon the faith of the agreement to secure it by assigning as collateral security the note in suit, it necessarily follows as a legitimate sequence that by the assignment or transfer of the note to appellee, appellant's bank simply discharged that which it, under its agreement, had obligated itself to do in order in the first instance to secure the money, and as to whether the same was obtained as a loan or as a deposit to be paid at a fixed time is evidently not an essential feature of the transaction. That an incorporated bank or banking institution may borrow money in the prosecution of its business, and secure the payment thereof by collaterals, or otherwise, is a well settled proposition, and the fact that such bank is insolvent at the time the loan is obtained does not impair or deprive the bank of its power or right to negotiate the loan and secure the payment thereof, unless it is forbidden by some statutory provision. *First Nat. Bank v. Arnold*, 156 Ind. 487; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. 412; Boone's Law of Banking, §22; 1 Morse on Banking (3rd ed.), §§48, 160; Zane on Banks, §125.

We conclude that the record in this appeal presents no reversible error, and that the judgment should be affirmed. Judgment affirmed. Monks, J., did not participate in this decision.



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State, *ex rel.*, v. Overman.

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THE STATE, EX REL. BOARD OF DIRECTORS OF THE  
COUNTY INFIRMARY OF DARKE COUNTY, OHIO, v.  
OVERMAN, SHERIFF OF RANDOLPH COUNTY.

[No. 19,800. Filed June 19, 1901.]

**MANDAMUS.**—*Pauper.—Insane Person.—Deportation from State.*—

The board of directors of an infirmary of a county in the state of Ohio is not entitled to a writ of mandate to compel the sheriff and jailer of a county in this State to receive and imprison an insane pauper that such sheriff had secretly conveyed and released in the Ohio county. *pp. 143-146.*

**SAME.**—*Pauper.—Insane Person.—Deportation from State.—Constitutional Law.*—Section 2, article 4 of the United States Constitution securing to the citizens of all the states the privileges enjoyed by the citizens of each state does not authorize the board of directors of an infirmary of a county in Ohio to compel by mandamus the sheriff of a county in this State to receive an insane pauper that such sheriff had secretly conveyed and released in the Ohio county. *pp. 143-146.*

From Randolph Circuit Court; *A. O. Marsh*, Judge.

Mandamus by directors of county infirmary of Darke county, Ohio, to compel Thomas J. Overman as sheriff of Randolph county, Indiana, to receive an insane pauper into his custody. From a judgment in favor of defendant, plaintiff appeals. *Affirmed.*

*A. L. Clark* and *Anderson & Bowman*, for appellant.

*J. W. Macy*, *J. P. Goodrich*, *A. L. Bales*, *Theo. Shockney* and *J. J. Cheney*, for appellee.

**DOWLING, J.**—This was an application for a writ of mandate requiring the appellee to receive into his custody, and to detain in the jail of Randolph county, Indiana, one Roll Joseph, an insane person. Alternative writ issued. Demurrers to complaint and to alternative writ, because the appellant had not the legal capacity to sue, and for want of facts, sustained. Judgment on the demurrers. The error assigned is upon the rulings on the demurrers.

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The material allegations of the complaint were these: Thomas J. Overman was, at the time of the commencement of the action, the sheriff of Randolph county, Indiana; on December 8, 1897, one David B. Strahan was his predecessor in that office, and continued to discharge its duties until succeeded by the said appellee; the relator is the board of directors of the county infirmary of Darke county, Ohio; by the provisions of §961 of the revised statutes of Ohio, the relator is a body corporate and politic by the name of the board of directors of the county infirmary of the county of Darke, in the state of Ohio, and by that name may sue and be sued in any court within said state of Ohio.

On December 8, 1897, one Roll Joseph was prosecuted upon information and affidavit in the Randolph Circuit Court, for the county of Randolph, in the State of Indiana, for the crime of burglary. A plea of insanity was filed on his behalf, and, upon the trial, the defendant was acquitted, upon the ground that he was of unsound mind at the time the offense was committed; thereupon, the court ordered that he be kept in custody until proceedings for his commitment to the Indiana Hospital for the Insane could be taken; such proceedings were had before two justices, who found and certified that Joseph was an insane person, and a proper subject for treatment at the hospital for the insane; that it was dangerous to the community to permit him to be at large; that he was held in custody in the county jail of Randolph county, and that he had a legal settlement in that county; an application was made for the admission of the said Joseph to such hospital, but he was not admitted for want of room; afterwards, the sheriff of Randolph county, who was *ex officio* its jailer, took Joseph from the jail of Randolph county, secretly conveyed him into the county of Darke, and there left him on the roadside, with no person to restrain him from injuring the persons and property of the citizens of Darke county; the sheriff of Randolph county had no warrant or other authority for his proceedings, and

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took them for the purpose of ridding himself and the county of Randolph of the custody, burden, and expense of taking care of Joseph, and casting that burden on Darke county; on the day Joseph was so left in Darke county, to wit, June 29, 1898, he was arrested for the malicious destruction of property in said county, and in default of bail was committed to jail on said charge to await the action of the grand jury of said county; no bill was found, however, and the release of Joseph was ordered by the court; it appearing to the court that Joseph was dangerously insane, and a pauper, that he had no legal settlement in the state of Ohio, but that he had such settlement in the county of Randolph, in the State of Indiana, the court further ordered that he be held in jail by the sheriff of Darke county as a dangerously insane person, until he could be transported to the State of Indiana; as soon as the sheriff of Darke county became aware of Joseph's condition, and of the manner in which he was brought into the said county of Darke, he tendered the said Roll Joseph to the sheriff of Randolph county, Indiana, and demanded that he receive him back into his care and custody, which the said sheriff refused to do, and as a result thereof the said Joseph may become a permanent charge upon the said county of Darke, to the damage of the relator; by the provisions of §969 of the revised statutes of Ohio, the relator, the board of directors of the county infirmary of Darke county, Ohio, may remove any person becoming a charge upon the county, who has no legal settlement in the state of Ohio, into the county and state where such person has a legal settlement.

The only question before us for determination is whether the relator is entitled to the extraordinary remedy demanded. The writ of mandate can be issued only (1) when the relator has a clear legal right to the performance of a particular act or duty at the hands of the respondent, and (2) where the law affords no other adequate or specific remedy to secure the enforcement of the right and the per-

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formance of the duty which the relator seeks to coerce. High on Ex. Leg. Rem., §10.

Upon the most liberal view of the appellant's case it cannot be said that a foreign political corporation has a clear right to cause an insane and dangerous pauper, having a settlement in Indiana, to be imprisoned in a jail in the latter State. The sole purpose of this proceeding, as set forth in the complaint, is to compel the sheriff of Randolph county to receive and confine a person alleged to be insane, dangerous, and a pauper. It is possible that this may be an official duty owing to the insane person and to the citizens of Randolph county, but it is in no sense a duty owing by the sheriff of Randolph county to the board of directors of the county infirmary of Darke county, Ohio. High on Ex. Leg. Rem. §10.

The order of the court of common pleas of Darke county, Ohio, that the pauper be held by the sheriff of that county until he could be transported to the State of Indiana, had no extraterritorial effect. The order of the court did not undertake to direct what disposition should be made of the pauper after his deportation from the state of Ohio, but, if it had, it would have created no obligation on the part of the sheriff of Randolph county to execute such judgment. Counsel for the relator contend that the right of the board of directors of the county infirmary of Darke county to compel the sheriff and jailer of Randolph county to receive and imprison the insane pauper is derived from the Constitution of the United States, article 4, §2, which secures to the citizens of all the states the privileges enjoyed by the citizens of each state. But this clause has never been understood to extend to foreign corporations, or to embrace the right to maintain actions of the character of that at bar.

The several states of the Union have adopted various methods to protect themselves against the immigration of paupers from other states, but we have been referred to no case, state or federal, in which it has been held that it is

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necessary or proper for one state to go into the courts of another to coerce the latter to receive and take care of its own paupers. On the contrary, it has been decided that where a statute makes it penal to bring a pauper into the state, the officers of another state, into which a pauper has been wrongfully removed, who return him to the place where he has a legal settlement, may be convicted under the statute. *Winfield v. Mapes*, 4 Denio 571.

We conclude, therefore, that, upon the ground that the right of the relator to compel the sheriff and jailer of Randolph county, Indiana, to receive and imprison the insane pauper was not clear, the demurrer to the complaint for want of facts might well have been sustained.

But it is equally evident that if any cause of action on the part of the relator existed, *mandamus* was not the proper remedy for its enforcement. Other adequate remedies were available by which any rights held by the relator could have been asserted and maintained. If the security of the persons and property of the citizens of Ohio required that the insane pauper should be restrained of his liberty, the laws of that state authorized his detention in prison. If the state, or any of the agencies through which it cares for its poor, were wrongfully subjected to expense for the maintenance of the insane pauper, the question of the liability of Randolph county to reimburse the state of Ohio, or the county of Darke, or the relator, for such expense could have been presented to the courts of this State by an action to recover the same. Or, it may be, that the mere removal of the poor person out of the state of Ohio would have accomplished the end desired. *Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146.

The statutes of the state of Ohio, defining the rights and powers of the board of directors of the county infirmary of Darke county, were not set out in the complaint, and it does not appear that this corporation had such an interest in the

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subject of the action as authorized a suit in its name as relator, even if a cause of action existed.

The court did not err in sustaining the demurrers to the complaint. Judgment affirmed.

Monks, C. J., did not participate in this decision.

## KLEIN v. THE STATE.

[No. 19,479. Filed June 20, 1901.]

**CRIMINAL LAW.—*Plea in Abatement.—Former Jeopardy.***—The plea of former jeopardy is a plea in bar, and not pleadable as a plea in abatement. *p. 148.*

**SAME. — *Plea in Bar. — Former Jeopardy.***—A defendant is not in legal jeopardy, within the meaning of the constitutional restriction, until he has been put upon trial before a court of competent jurisdiction, upon an indictment or information sufficient in form and substance to sustain a conviction. *p. 148.*

**SAME.—*Plea in Bar.—Delay in Trial.***—A plea alleging the failure of the State to accord defendant a trial within three terms after his arrest, under the provisions of §1852 Burns 1894, must show that the delay was not caused by defendant's own act. *pp. 148, 149.*

**SAME.—*Plea in Abatement.—Prosecution by Information.***—A plea in abatement challenging the right of the State to prosecute by information, alleging that no public offense had been committed by defendant at the time of filing the information, and that he was not then under legal charge of having committed the offense stated in the information, does not negative that a public offense had been committed previous to the time of filing the information for which the defendant might be prosecuted, and of which he was accused and not indicted, and the grand jury had been discharged for the term. *pp. 149, 150.*

**APPEAL AND ERROR.—*Bill of Exceptions.***—A bill of exceptions filed at a subsequent term of court, without leave of court so to do affirmatively appearing from the order-book entry cannot become a part of the record on appeal. *pp. 150-152.*

**CRIMINAL LAW.—*Records.—Lost Information.—Substitution of Copy.***—Where after trial and verdict, and after motion for new trial had been filed, but before final judgment, the information upon which defendant was tried became lost, and the court ordered a copy thereof, which he certified to be correct, to be spread upon the information record, defendant was not injured by such substitution, and the court was not thereby divested of authority to pronounce final judgment. *pp. 152, 153.*

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159	544
157	146
161	121

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From Vanderburgh Circuit Court; *H. A. Mattison*, Judge.

John Klein was convicted of burglary, and appeals. *Affirmed.*

*A. J. Clark, G. Paul and E. Lorch*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores, C. C. Hadley, E. Durre, C. T. Curry* and *C. N. Wittenbraker*, for State.

HADLEY, J.—Appellant was tried and convicted of burglary upon an affidavit and information, which were filed in the Vanderburgh Circuit Court January 18, 1900, and which in substance charged that appellant and others named on the 5th day of May, 1898, at said county and State, did then and there unlawfully, forcibly, and feloniously, in the night-time, burglariously break and enter into the storehouse of one August Kornblum there situate, with intent then and there, and thereby, to unlawfully, forcibly, feloniously, and burglariously, take, steal, and carry away, the personal goods and chattels of said August Kornblum then and there being.

Appellant challenges the rulings of the court (1) in sustaining the State's demurrer to his plea in abatement; (2) in overruling his motion to quash; (3) for a new trial, and (4) in arrest of judgment. For plea in abatement he set up that he is a citizen of the state of Ohio; that on the 10th day of May, 1898, the prosecuting attorney of Vanderburgh county filed in this (circuit) court an information, based upon a sufficient affidavit, charging appellant with the same crime of burglary charged in this information; that said former affidavit and information fully and correctly charged the appellant with the crime of burglary according to the laws of the State of Indiana; that on September 18, 1899, said prosecuting attorney, with leave of court, entered a *nolle prosequi* in said cause as to the appellant without appellant's knowledge or consent; that from the time of

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filing said former affidavit and information, to wit, May 10, 1898, more than three terms of the court had elapsed without a trial of appellant; that the affidavit and information upon which the prosecution is had (filed January 18, 1900), charge precisely the same offense, in the same terms, as that charged in the former affidavit and information; that at the time of filing the affidavit and information he was not in custody, or on bail, for this or other offense; that he was not tried under the former proceeding, and no indictment or information against him had been quashed; that no cause against him has been appealed to the Supreme Court and reversed on account of a defect in the indictment; that no public offense had been committed by this defendant when this prosecution was begun, and that he was not *then* under the charge of having committed the offense stated in the information. The plea is in a single paragraph, but seems to count upon three distinct grounds for an abatement of the prosecution; (1) former jeopardy, (2) failure of the State to accord him a trial within three terms after his arrest under the provisions of §1852 Burns 1894, §1783 R. S. 1881 and Horner 1897, and (3) want of authority to prosecute by affidavit and information.

With respect to the first ground, it is radically bad for two reasons, (1) because the plea of former jeopardy is a plea in bar, and not pleadable with a plea in abatement, and (2) because it is wholly insufficient either as a plea in bar, or abatement, for failure to allege that appellant had been placed upon his trial on the former information. A defendant is not in legal jeopardy within the meaning of the constitutional restriction until he has been put upon his trial before a court of competent jurisdiction, upon an indictment or information, which is sufficient in form and substance to sustain a conviction. Cooley's Const. Lim. (6th ed.), p. 399, and cases cited. See, *Rowland v. State*, 126 Ind. 517; *Dye v. State*, 130 Ind. 87.

The second ground is equally faulty for the absence of an



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averment that the delay in his trial for more than three terms of court was not caused by his act.

Third, "It shall not be necessary, in an information, to state the reason why the proceeding is by information instead of indictment. And in a prosecution for a felony by information, it shall not be necessary to prove the facts showing a right so to prosecute by information, unless such facts are put in issue by a verified plea in abatement." §1802 Burns 1894, §1733 R. S. 1881 and Horner 1897.

It is therefore essential to a plea in abatement challenging the right of the State to prosecute by information specifically to allege the facts relied upon to show that the State is proceeding without warrant of law. The State is authorized to prosecute, by information, for all offenses, except treason and murder, in the following cases: (1) When the defendant is in custody, or on bail, and the court is in session and the grand jury is not in session. (2) When an indictment has been quashed, and the grand jury for the term is not in session. (3) When a cause has been appealed to the Supreme Court, and reversed on account of a defect in the indictment. (4) When a public offense has been committed and the party charged (accused) is not under indictment therefor, and the court is in session, and the grand jury has been discharged for the term. §1748 Burns 1894, §1679 R. S. 1881 and Horner 1897. If any one of these conditions exists the State may prosecute by information, and, to make a plea in abatement sufficient against such a prosecution, it must affirmatively show that no one of these conditions did exist at the time the prosecution was begun. *State v. Drake*, 125 Ind. 367; *Lankford v. State*, 144 Ind. 428.

This plea falls far short of negating the conditions of the fourth clause. The averments are that no public offense had been committed by the defendant *at the time* of filing the information, and that he was not *then* under the charge (legal charge) of having committed the offense stated in

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the information. The force and scope of these averments are made manifest by the preceding allegations of the plea to the effect that the crime charged in this information is the identical crime charged against him by a previous information as having been committed on the 5th day of May, 1898, and which former information had been *nollied* and was not pending at the time this information was filed. The plea by no means negatives, that a public offense had been committed previous to the time of filing this information for which the defendant might be prosecuted, and of which he was accused, and was unindicted, and the court was in session and the grand jury had been discharged for the term. The plea in abatement was insufficient and the demurrer thereto was properly sustained.

We perceive no infirmity in the affidavit and information. The argument made against them goes to the sufficiency of the evidence, and not to the sufficiency of the information.

Several alleged errors in the admission and exclusion of evidence, and in the giving and refusing of instructions, in the amendment of the information, and in the spreading of record of a copy of the information, are assigned as reasons for a new trial. The Attorney-General insists that neither the evidence, nor what purports to be a general bill of exceptions, is in the record. It is apparent that an effort has been made to bring up the evidence under the act of 1899 (Acts 1899, p. 384) the sixth section of which act, relating to the certification of the evidence, has been held invalid by this court in *Adams v. State*, 156 Ind. 596. It must therefore appear that the evidence has been authenticated in substantial compliance with the provisions of the act of 1897 (Acts 1897, p. 244) or it must be adjudged not in the record. The record discloses that the motion for a new trial, and in arrest of judgment, were overruled, and final judgment entered on the thirty-third judicial day of the June term, the same being the 12th day of July, 1900, and concurrent therewith an order of court was made upon the

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shorthand reporter to make out a complete transcript of the evidence and rulings, and upon the clerk to make a complete transcript of the record, for use of the defendant "within 30 days from this date." Exceptions to the overruling of the motion for a new trial, and in arrest of judgment, were timely reserved, but no time was requested, or granted by the court, in which to file bills of exception. It further appears that on the forty-sixth judicial day of the June term, to wit, on August 9, 1900, and within the limits of the order, the shorthand reporter "filed in the office of the clerk the longhand manuscript of the shorthand report of the trial, which is in the words and figures following, to wit." Then follow sixty-eight pages of what purports to be questions and answers; and the rulings of the court, on proffered evidence, at the conclusion of which is a certificate of the reporter, that the foregoing typewritten manuscript is a full, true, and complete copy in longhand of the shorthand report of the evidence, objections, rulings, and exceptions, and that the same contains all the evidence given in said cause. Next following the reporter's certificate is the certificate of the trial judge, dated the 21st day of September, 1900, wherein he certifies that the reporter was a competent person duly appointed and sworn to report the case and did report it, and that the longhand transcript of the evidence filed in the clerk's office, and certified by said reporter, is correct and contains all the evidence given in said cause. Then follows the certificate of the clerk, whereby it is certified that the foregoing transcript of evidence is the same transcript of evidence in said cause filed by the reporter and that the certificate attached thereto is that of the presiding judge and that said transcript was filed in his office on the 9th day of August, 1900, and that the certificate of the judge was attached thereto and filed in the office of the clerk on the 21st day of September, 1900, and that said transcript of the evidence was inserted by him in the transcript of this cause as the same therein appears. No time beyond the term

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having been given appellant in which to file bills of exception made it necessary for him to file all bills of exceptions within the limits of the term at which the case was disposed of. A bill filed at a subsequent term without leave of court so to do affirmatively appearing from an order-book entry cannot become a part of the record on appeal. *Robards v. State*, 152 Ind. 294; *Utterback v. State*, 153 Ind. 545, and cases cited; *Calvert v. State*, 91 Ind. 473; Ewbank's Manual, §24.

We take notice that the limit of the June term, 1900, of the Vanderburgh Circuit Court was ten weeks from the first Monday in June. This bill, if it may be so termed, was not signed by, or presented to, the judge for approval, until the 21st day of September, 1900, which time we also judicially know was within the September term of that court. We must therefore hold that the evidence is not in the record.

With respect to the general bill of exceptions it is in no better situation. The record shows that it was presented to the judge July 21, 1900, which was within the authorized limits of the June term, but it was not signed and filed until September 17, 1900, which we have seen was at the September term. This was too late. It is only in cases where *time is given beyond the term* that the time of presentation to the judge, within the prescribed limit, shall be regarded as the date on which the bill was signed and filed. §1918 Burns 1894, §1849 R. S. 1881 and Horner 1897; *Robards v. State*, 152 Ind. 294.

The ground of appellant's motion in arrest of judgment is want of power in the court to pronounce final judgment, for the reason that there was no information on file at the time. It is shown by the bill of exceptions that after the trial and verdict, and after the motion for a new trial had been filed, but before the final judgment, the information upon which the appellant had been tried became lost, and the court thereupon ordered that a copy thereof as made by him in his instructions to the jury, which he certified

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to be true and correct, be spread upon the information record. The information was before the court during the trial, and until after the conviction of the appellant, and until he had prepared and filed his motion and reasons for a new trial. We do not see what further benefit he could have derived from the original instrument, or how he could be injured by the substitution of a copy before final judgment. Without injury, he is not entitled to reversal. *Ransbottom v. State*, 144 Ind. 250; *Heath v. State*, 101 Ind. 512.

The loss of the information did not divest the court of authority to proceed.

Judgment affirmed.

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MARTIN ET AL. v. WILLS ET AL.

[No. 19,848. Filed June 21, 1901.]

**MUNICIPAL CORPORATIONS.—Street Improvements.—Enforcement of Assessments.—Foreclosure.—Precept.—Barrett Law.**—Street improvement assessments may be collected by the contractor by precept issued by order of the common council of the city as provided by §4298 Burns 1894 or by foreclosure of the lien and sale of the property as provided in §4294 Burns 1894. p. 154.

**SAME.—Street Improvements.—Constitutional Law.—Barrett Law.**—The act of 1889 known as the Barrett law and the amendments thereto, providing for the apportionment of the costs of a street improvement upon the abutting lots according to their frontage, are not in conflict with any provision of the State or United States Constitution. pp. 154, 155.

From Boone Circuit Court; *J. V. Kent*, Judge.

Action by Charles G. Wills and others against Thomas H. Martin and others to enforce the lien of an assessment for a street improvement. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

*T. J. Terhune* and *C. M. Zion*, for appellants.

*P. H. Dutch*, for appellees.

**MONKS, C. J.**—Appellees brought this action to enforce the lien of an assessment for a street improvement, under

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the provisions of the act of 1889, and the amendments thereto, known as the Barrett law. The case was put at issue, and a trial by the court resulted in a special finding of facts, conclusions of law stated thereon, and judgment in favor of appellees enforcing said lien. The errors assigned, and not waived, are: (1) The court erred in overruling the demurrer to the amended complaint; (2) the court erred in sustaining the demurrer to the third paragraph of answer; (3) the court erred in the conclusions of law.

Appellants insist that the assessments for improvement under the Barrett law can only be collected by precept issued by order of the common council of the city, upon the filing of a proper affidavit of the contractor, as provided in §4298 Burns 1894, §6780 Horner 1897. It is true that a contractor may pursue the remedy provided in said section, but the assessments made against property for such improvements may also be collected by a foreclosure of the lien and sale of the property as provided in §4294 Burns 1894, §6777 Horner 1897. *Dowell v. Talbott Paving Co.*, 138 Ind. 675; *Bozarth v. Mallett*, 11 Ind. App. 417; *Bozarth v. McGillicuddy*, 19 Ind. App. 26.

The other objection urged to the amended complaint as well as the questions argued under the second and third errors assigned are predicated on the theory that the Barrett law and the amendments thereto are in violation of §§21 and 23 of article 1 of the Constitution of this State, and that they are also in violation of the fourteenth amendment of the federal Constitution, under the doctrine declared in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. Appellants contend that it was held by the Supreme Court of the United States in *Norwood v. Baker*, *supra*, that a law providing for the apportionment of the cost of the improvement of a public street upon the abutting lots according to their frontage without a hearing as to the special benefits to said property is in violation of the fourteenth amendment of the Constitution of the United States. Said Barrett law and the amendments thereto as

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interpreted by this court are not obnoxious to any provision of the State or federal Constitution, even if the contention of appellants as to the holding in *Norwood v. Baker*, *supra*, is correct. *Adams v. City of Shelbyville*, 154 Ind. 467, 49 L. R. A. 797; *Defrees v. Ferstl*, 154 Ind. 695; *City of Indianapolis v. Holt*, 155 Ind. 222; *Taylor v. City of Crawfordsville*, 155 Ind. 403; *Schaefer v. Werling*, 156 Ind. 704.

The Supreme Court of the United States, however, has held in a number of cases that no such rule as that asserted by appellants was declared in the case of *Norwood v. Baker*, *supra*. In *Webster v. City of Fargo*, 21 Sup. Ct. 623, that court said: "But we agree \* \* \* that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of this court in *Norwood v. Baker* to hold otherwise."

In *French v. Barber, etc., Co.*, 21 Sup. Ct. 625, it was held by the same court that a state law apportioning the entire cost of a street improvement upon the abutting lots according to their frontage, without any hearing as to the benefits, is not in violation of the fourteenth amendment to the Constitution of the United States. The following cases decided by the Supreme Court of the United States on April 29, 1901, declare the same rule: *City of Detroit v. Parker*, 21 Sup. Ct. 624; *Cass Farm Co. v. City of Detroit*, 21 Sup. Ct. 644; *Shumate v. Heman*, 21 Sup. Ct. 645; *Farrell v. Park Commrs.*, 21 Sup. Ct. 609; *Town of Tonawanda v. Lyon*, 21 Sup. Ct. 609.

Finding no error in the record, the judgment is affirmed.

#### CONCURRING OPINIONS.

BAKER, J.—Appellants contend that the Barrett law not only conflicts with the fourteenth amendment of the federal Constitution, but also contravenes those provisions of our

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State Constitution which forbid the taking of property without just compensation and due course of law.

In *Adams v. City of Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, it was held that the principles applicable to assessments for local improvements are these: "The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality; the legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district; each parcel of contributing property may be assessed only to the extent that it actually receives special benefits; the taxing district as a whole may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property; the improvement so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury; property owners affected by an improvement, within a taxing district, are entitled to a hearing on the question of special benefits."

In the dissenting opinion in *Adams v. City of Shelbyville*, *supra*, no disagreement with these principles was expressed, but on the contrary they were fully concurred in. The only point of difference was whether the Barrett law did or did not afford the property owners a due opportunity to be heard on the question of special benefits as an issue of fact.

The right of the property owner to a hearing on the question of special benefits as an issue of fact was held to be guaranteed by the State and federal Constitutions. So far as the federal Constitution was concerned, it was taken that the controlling principles were stated in *Norwood v. Baker*, 172 U. S. 269. But the final and authoritative exposition of the federal Constitution and of the decisions of the Supreme Court of the United States in reference thereto must



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come from that court. In a dissenting opinion in *City of Indianapolis v. Holt*, 155 Ind. 222, it was suggested that the Supreme Court of the United States might thereafter decide that a statute, providing ample notice of assessments by frontage and affording due opportunity to be heard on the question whether the assessments were equally and properly apportioned by frontage, but denying the property owner a hearing on the question of special benefits as an issue of fact, was not in conflict with the fourteenth amendment, but that, until then, the principles promulgated in *Norwood v. Baker*, *supra*, should be followed. And in *French v. Barber, etc., Co.*, 21 Sup. Ct. 625, and other concurrent decisions, that court has so decided and virtually overruled or construed away the *Norwood-Baker* decision. These later decisions are binding upon this court on the question of conflict between the street improvement laws of this State and the fourteenth amendment to the federal Constitution. But they have no compulsive force with respect to the construction of our State Constitution. How, then, does this case stand in the light of the guaranties of our Constitution? According to the principles announced in *Adams v. City of Shelbyville*, 154 Ind. 467, the appellants' property was not subject to assessment for street improvements except under a law that afforded them a hearing on the question of special benefits as an issue of fact. In the same case, it was held by a majority of the court that the Barrett law provided for such a hearing. And it is only on the basis that appellants were afforded their constitutional right to a hearing on the question of special benefits as an issue of fact under the Barrett law as construed by a majority of the court that I concur in the affirmance of the judgment.

HADLEY, J.—I concur in the result, and also in the reasoning, assuming that no inference arises from the opinion that the legislature may, under the provisions of our State Constitution, authorize the arbitrary assessment of special benefits by the front foot rule, and deny to the abutter a hearing and an adjustment on the basis of actual benefits.

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159 509|OREN v. BOARD OF COMMISSIONERS OF ST. JOSEPH  
COUNTY.

[No. 19,879. Filed June 21, 1901.]

COUNTIES.—*Sale of Bonds.—Services of Treasurer.*—A county treasurer is required under §7837 Burns 1894 to receive and care for bonds issued by the county and deliver them to the purchaser upon the proper order of the board of commissioners, and is not entitled to extra compensation for services in the sale of such bonds in the absence of an employment. *p. 161.*

PLEADING.—*Argumentative Denial.*—An answer in denial of the material allegations of a complaint may be good, although argumentative, and where the general denial is withdrawn and the cause appealed, its merits as against demurrer must be determined by the character and materiality of its averments. *p. 162.*

From Laporte Circuit Court; *J. C. Richter*, Judge.

Action by William H. Oren against the board of commissioners of St. Joseph county for services rendered in sale of bonds. From a judgment in favor of defendant, plaintiff appeals. *Affirmed.*

*M. H. Weir, E. E. Weir, L. Darrow, H. R. Wair and B. F. Shively*, for appellant.

*A. L. Brick, D. D. Bates, A. Anderson, J. Du Shane and W. G. Crabill*, for appellee.

DOWLING, J.—Action by the appellant against the appellee to recover commissions alleged to be due to appellant for services rendered by him in the sale of certain bonds issued by the county of St. Joseph. The suit was brought in the St. Joseph Circuit Court, and the venue was changed to Laporte county. The complaint was in two paragraphs. The answer was in four, the first being the general denial. A demurrer to the third paragraph of the answer was overruled, and, thereupon, the first, second, and fourth paragraphs of the answer were withdrawn. The appellant refusing to plead further, the court rendered judgment, on the

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demurrer, in favor of the appellee. The ruling on the demurrer is assigned for error.

The first paragraph of the complaint is substantially as follows: On November 1, 1899, the board of commissioners of St. Joseph county and the appellant, Oren, entered into an oral contract by which the appellee employed the appellant to negotiate, sell, and dispose of certain bonds issued by said county to the amount of \$273,000, for the purpose of erecting a court-house in the city of South Bend. By said contract the appellee agreed to pay the appellant a reasonable compensation for his services. Two and one-half *per centum* upon the face value of the bonds so disposed of was such reasonable compensation. In pursuance of said agreement, the appellant sold, negotiated, and disposed of the said bonds for the use of the appellee to N. W. Harris & Company, of Chicago, Illinois, who paid for said bonds the sum of \$273,000 on account of the principal thereof, with \$15,000 as premium. Appellant fully performed all of the conditions of the said agreement on his part to be performed. Before the commencement of the action, the appellant presented his said claim to the board while in session, and the board made an allowance to him of \$75 for his said services, which he refused to accept; the residue of said claim was disallowed, and is due and unpaid. The second paragraph is similar to the first, except that it avers that on March 1, 1896, the appellant entered the service of the appellee, at its request, as the agent of the appellee, to negotiate, sell, and dispose of the said bonds.

The material averments of the third paragraph of the answer, which was addressed to the whole complaint, were these: In the year 1896, the county of St. Joseph, by its board of commissioners, was engaged in building a new court-house for said county, and to provide funds therefor it executed its bonds in the manner authorized by the statute to the amount of \$273,000; these bonds were delivered to the auditor of the county, as required by law, and the auditor,

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in pursuance of his official duty, in turn, delivered them to the appellant, who was then and there the county treasurer of said county, and who received said bonds in that capacity; the said board did not employ the appellant to sell, dispose of, or to take care of the said bonds, or to do anything in connection with the same; only \$243,000 of said bonds were sold, and the remaining \$30,000 thereof were returned to the county, and credit for the same was given to the appellant, as such treasurer; all that the appellant did in relation to the sale of the said bonds was done by him as county treasurer in the discharge of the duties of his said office, as prescribed by law, and for which he received his salary.

The sufficiency of the answer is contested by the appellant upon the grounds that many of its allegations are surplusage, that others are conclusions of law, that the paragraph does not confess and avoid the allegations of the complaint, that it does not directly traverse them, and that it is, at best, merely an argumentative denial. Very little professional skill was exhibited in the preparation of the answer, and the slightest attention to the rules of good pleading would have materially improved its form and technical accuracy. The appellee assails the sufficiency of the complaint for the reason that it does not set out more specifically the terms of the alleged agreement between the parties and asserts that, even if the answer is bad, it is good enough for a bad complaint. The complaint is probably bad, but assuming that it required an answer, in our opinion the answer was sufficient. The first paragraph of the complaint avers that the appellee employed the appellant to negotiate and sell its bonds, and that it agreed to pay the appellant a reasonable compensation for his services; the second paragraph of the complaint alleges that the appellant entered into the service of the appellee, at its request, as its agent to sell its bonds, and that a reasonable compensation for the services performed by appellant in the sale of the bonds was two and one-half *per centum* of their face value. The answer states

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that, at the time of the transactions mentioned in the complaint, the appellant was the treasurer of St. Joseph county, and that the bonds were placed in his hands as such treasurer.

The very foundation of the claim of the appellant against the appellee was his supposed employment by the appellee to sell the bonds. The legal effect of the averment of the second paragraph of the complaint "that he entered into the service of the defendant, at the defendant's request, as the agent of the defendant, to negotiate, sell, and dispose of bonds," etc., is nothing more nor less than an allegation that he was employed by the appellee to negotiate, sell, and dispose of them. The circumstance that the appellant did dispose of the bonds is immaterial, if he was not employed to do so. The answer expressly denies that the appellant was employed to negotiate, sell, or dispose of the bonds, and avers that all his acts in connection with the bonds were performed merely in the discharge of the duties of his office as the treasurer of the county. Where bonds are issued by a county, it is made the duty of the auditor to deliver them to the treasurer, and to charge him therewith upon the proper books of his office. Such bonds, when so delivered, are deemed a part of the funds of the county in the hands of the treasurer, and he is liable for the same upon his official bond. §7837 Burns 1894.

Under the provisions of this section, when bonds are issued by a county, it is the duty of the treasurer to receive them from the auditor, to keep them securely as a part of the funds of the county, and to deliver them to the purchaser upon the proper order of the board of commissioners. For the performance of these duties the treasurer is entitled to no compensation beyond his salary. The answer denies that the appellant was employed by the board to negotiate and sell the bonds, and alleges that he had no connection with them except to discharge these official duties. These facts must be regarded as well pleaded. The demurrer admits

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their truth. But if the appellant was not employed to sell the bonds, and merely discharged the duties imposed upon him by law in receiving, keeping, and delivering them to the purchasers, he cannot maintain an action against the county for commissions for selling them. The third paragraph of the answer must be regarded as an argumentative denial of the complaint, and it was sufficient in form to make an issue of fact. An answer in denial of the material fact or facts of a complaint may be good, although argumentative, and it is not error to overrule a demurrer to it. *Clauser v. Jones*, 100 Ind. 123; *Leary v. Moran*, 106 Ind. 560; *Hiatt v. Town of Darlington*, 152 Ind. 570; *Judah v. Vincennes University*, 23 Ind. 272; *Loeb v. Weis*, 64 Ind. 285; *Stoddard v. Johnson*, 75 Ind. 20.

Before the withdrawal of the general denial, the third paragraph might have been stricken out on motion, on the ground that it was an argumentative denial; but, as the appellant did not ask to have it stricken out, its merits must be determined by the character and materiality of its averments.

There is no error in the record. Judgment affirmed.

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CITY OF NOBLESVILLE v. NOBLESVILLE GAS AND IMPROVEMENT COMPANY.

[No. 19,448. Filed June 21, 1901.]

**MUNICIPAL CORPORATIONS.—Natural Gas.—Fixing Rates for Consumers.—Franchises.**—The act of 1887 (Acts 1887, p. 36) does not confer upon municipal corporations the authority to regulate the prices charged by a natural gas company to its consumers. pp. 166-168.

**SAME.—Natural Gas.—Franchises.—Rates.—Acceptance.**—Although a city has no authority under the act of 1887 (Acts 1887, p. 36) to fix the rates for natural gas to consumers, an ordinance passed by a city fixing the rates and accepted by a gas company amounts to a contract and is binding on the company. pp. 168, 169.

**SAME.—Natural Gas.—Franchises.—Rates.—Acceptance.**—Where a natural gas company was operating under an ordinance which did not fix the rates to be charged consumers, and afterward accepted

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the terms of an ordinance adopted by the city fixing the rates, the company is bound by the latter ordinance, as the legal authorization of a schedule of rates was a sufficient consideration for the acceptance. *pp. 169, 170.*

**MUNICIPAL CORPORATIONS. — *Natural Gas. — Franchises. — Rates.* —**

Where a gas company in accepting an ordinance fixing the rates to be charged consumers expressly reserved all vested rights under its franchise, one of the provisions thereof being the right to fix its own prices, within reasonable limits, for gas, such reservation will be held to apply to all uses of gas not specified in the last ordinance. *p. 170.*

**INJUNCTION. — *Natural Gas Company. — Municipal Corporations. —***

*Complaint.* — In an action by a gas company, having the right to make reasonable charges for gas to its consumers, to enjoin the enforcement of an ordinance fixing the rate of charges, the complaint was not bad for failing to allege that the prices charged by plaintiff were reasonable. *p. 170.*

**JUDGMENTS. — *Motion to Vacate.* —** Where the attorney for a city elected to stand on his demurrer to a complaint in an action against the city and appeal to the Supreme Court, and allowed judgment to be entered thereon, it was not error to overrule a motion to set aside the judgment and permit the city to answer, where it was not shown that any of the city council ever inquired of their attorney about the averments of the complaint, or that the attorney was guilty of fraud or deception. *pp. 170-172.*

From the Clinton Circuit Court; *J. V. Kent*, Judge.

Action by Noblesville Gas and Improvement Company to enjoin the city of Noblesville from the enforcement of an ordinance regulating the rates to be charged consumers of natural gas. From a judgment in favor of plaintiff, defendant appeals. *Affirmed.*

*G. Shirts, W. R. Fertig* and *R. K. Kane*, for appellant.

*F. E. Gavin, T. P. Davis* and *J. L. Gavin*, for appellee.

**HADLEY, J.** — Suit by appellee for injunction against the enforcement by appellant of its ordinance purporting to regulate the price to be charged by appellee for natural gas in certain cases. The complaint is in two paragraphs, to which a general demurrer was overruled. The city elected to stand by its demurrer, and judgment was rendered against it as upon default, in accordance with the prayer of the com-

plaint. Subsequently, but at the same term of court, the city filed its motion, supported by divers affidavits, to set aside the judgment, open the case, and allow it to file an answer, which motion was overruled. These two rulings present the only questions for decision. The complaint discloses that the town of Noblesville, in December, 1886, granted to appellee, a corporation, the right to lay and maintain its gas pipes and mains in the streets and alleys of the town for the purpose of supplying the town and its inhabitants with natural gas upon specified terms. There was no exclusive right, no time limit fixed for the continuance of the license, no restrictions upon the prices that might be charged for gas, and no reservation by the town of any right to revoke or to interfere at a subsequent date with appellee's enjoyment of the franchise. Under this grant appellee dug gas wells and put in its plant at great expense. Subsequently the town was incorporated as a city, and on April 11, 1888, the common council passed an ordinance entitled "An ordinance authorizing corporations, firms, or individuals, to lay and maintain pipes in the streets, alleys, and public grounds of the city of Noblesville for the purpose of supplying said city and its inhabitants with natural gas for heating and illuminating purposes", prescribing in said ordinance a schedule of maximum rates that might be charged for gas in the instances therein specified by any one accepting its provisions. In the schedule prescribed, among other omissions, no rate was fixed, or attempted to be fixed, for furnaces, and bath and water heaters, in residences. The board of directors of the gas company, by resolution duly passed and filed with the common council of the city, accepted the provisions of the ordinance of 1888, upon the express "condition that none of the vested rights of the Noblesville Gas & Improvement Company under former franchises shall be in any manner affected thereby." The schedule of rates prescribed by the ordinance of 1888 was precisely the same rates fixed and charged by the gas company prior thereto, and the same rates



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are now being charged. For furnaces, and bath and water heaters in residences, the company has heretofore, and is now, charging for furnaces from \$28 to \$38.50 per year, according to size of fire pot, running from twenty-two to twenty-eight inches, and for bath and water heaters, each \$6 per annum. In January, 1900, the common council of the city pretended to pass another ordinance termed by it as supplemental to, but not in repeal of, the ordinance of 1888, whereby it is attempted to prescribe another schedule of maximum rates chargeable by any corporation, firm, or person, now or hereafter furnishing gas to the inhabitants of the city, among which rates are, for furnaces in residences \$2.10 per room per year, kitchen, pantry, halls (except reception halls), and unfinished attics not to be counted, and no charge allowed for grates and other heaters in rooms of houses where furnaces are used; for bath and water heaters \$3.50 per annum. This last ordinance appellee refused to accept, and insists upon its right under its grant of 1886 to make its charges as it deems proper in all instances not provided for in the ordinance of 1888. Occupants of houses where furnaces and grates and other heaters are used refuse to pay, and give out in speeches that they will not pay anything for grates and other heaters, and only pay \$2.10 per room per year without reference to the amount of gas consumed. And many persons using bath and water heaters give it out in speeches that they are not required to pay and will not pay to exceed \$3.50 per year for such heaters; and many others are giving it out that they are not required to pay according to the ordinance of 1888, but according to the ordinance of 1900, and much contention and confusion has arisen between appellee and its customers as to the amount properly chargeable for gas, and by reason thereof many actions have been brought and are now pending in the Hamilton Circuit Court wherein the plaintiffs alleged that appellee is asserting the right to collect rates in excess of what it is entitled to, and injunctions are prayed against appellee

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from collecting its just demands, and many other similar suits are threatened and will be brought if not restrained. There was no consideration for the acceptance of the ordinance of 1888, and appellee is not bound thereby. The ordinance of 1900 constitutes a cloud on the franchises and rights of the appellee, and is made the basis by consumers for their contentions that they are not bound by the rates prescribed by the ordinance of 1888, nor by the rates fixed by appellee in cases where the ordinance of 1888 does not prescribe them. To avoid a multiplicity of suits, and to put to rest the many controversies that have arisen between appellee and the consumers of its gas, it is necessary that the court determine their respective rights under the ordinance of 1888 and 1900. Prayer that the ordinance of 1900 be adjudged null, and that appellant be perpetually enjoined from attempting to enforce its provisions against appellee, and that the rights of the parties concerned under the ordinance of 1888 be determined.

The real question presented by the demurrer is the validity of the ordinance of 1900. And the power of the city council to pass it is the only ground upon which it is controverted. Appellant impliedly concedes that to sustain its contention we must overrule the case of *Lewisville Gas Co. v. State, ex rel.*, 135 Ind. 49, 21 L. R. A. 734, and reassert the doctrine discarded in *City of Rushville v. Rushville Gas Co.*, 132 Ind. 575, 15 L. R. A. 321, and this we are earnestly urged to do. The city council attempted, by the ordinance of 1900, to accomplish but a single thing, namely, arbitrarily to regulate the prices chargeable by appellee to its consumers of gas. All are agreed that the power to pass such an ordinance must be drawn from legislative grant, and that the grant has not been made unless it be found within the provision of the act of 1887 (Acts 1887, p. 36), which reads thus: "That the boards of trustees of towns, and the common councils of cities, in this State, shall have power to

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provide by ordinance, reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities, and to require persons or companies to whom the privilege of using the streets and alleys of such towns and cities is granted for the supply and distribution of such gas to pay a reasonable license for such franchise and privilege."

It is not doubted that the power contended for by appellant resides in the lawmaking body of the State, and that it may be by such body conferred upon towns and cities. It is, however, no longer an open question that municipal corporations possess only such powers as are conferred upon them by the legislature, either in express terms or by necessary implication, and that when a fair and reasonable doubt exists as to the existence of power it will be resolved against the municipality, and the power denied. *Lewisville Gas Co. v. State, ex rel.*, 135 Ind. 49, 21 L. R. A. 734, and authorities cited.

It would be doing violence to the rules of statutory construction to hold that under the law of 1887 the power of a city, when not reserved in granting a franchise, to prescribe the prices chargeable by its licensee to consumers of its gas, is free from fair and reasonable doubt. It is insisted that the word "safe" should be construed as qualifying the word "supply" only, and that the words "distribution and consumption" are unqualified, and that the power to make regulations for the distribution and consumption of gas implies the power to regulate in any reasonable way calculated to promote safety, or health, or to protect the people against exorbitant charges. We must have reasons for such construction, and we find nothing in the structure of the statute itself, or in the circumstances and conditions existing at the time of its enactment to warrant the belief that the lawmakers intended any such thing. In addition to the reasons advanced in the *Lewisville* case it may be added that the people after four more years of experience in the pro-

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duction, conveyance, and use of natural gas, and the fuller knowledge of its dangerous nature, and the traffic in it as an article of commerce, and after having in 1889 (Acts 1889, p. 22, §3) expressly conferred upon towns and cities the power to grant the right to lay pipes through streets and alleys for distribution of natural gas to consumers, through their representatives in 1891, as a further precaution against danger from explosions, prescribed the minimum strength of the transporting pipes (Acts 1891, p. 89), and furthermore, at the same session, created the office of natural gas supervisor, and imposed upon that officer the duty of making "personal inspection of all the gas wells of the State", and of seeing "that every precaution is taken to insure the health and safety of workmen engaged in opening gas wells and laying mains and pipes, and of those who, in any manner, use gas for mechanical, manufacturing, domestic or other purposes" (Acts 1891, p. 379, §1), and at the same session, finding it then expedient to confer upon cities of 100,000 population the power contended for by appellant, were able to express their purpose in the clear, apt, words following: "The common council shall have power \* \* \* to license, tax, regulate and prohibit the supply, distribution and consumption of artificial and natural gas, of water and of electricity, *and to fix the prices thereof.*" Acts 1891, pp. 143, 148.

Since the discovery of natural gas, the protection of the people against the perils incident to its use has been conspicuously prominent in the legislation upon the subject, but after patient search we are unable to find any language, in any act, that fairly and reasonably imports a purpose of the legislature to interfere with its commercial value, or to confer upon towns and cities of less than 100,000 population the power to do so, and we must therefore hold that no such power exists. It follows that the ordinance of 1900 was *ultra vires* and void.

It is doubtful if we are called upon to decide anything

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with respect to the ordinance of 1888. But since it is alleged by appellee that its acceptance of the ordinance of 1888 was without consideration, and imposed upon it no obligation to abide the schedule of rates fixed by that ordinance, and the further averment that controversies have arisen between appellee and its customers as to the force and effect of that ordinance, and a multiplicity of suits threatened, we think it proper to consider the general subject.

The city had the unquestionable right to grant to any person, firm or corporation a franchise to occupy its streets and alleys for conveyance of gas to customers. But it was under no compulsion to convey such right to any one. The subject of grant rested in contract like any other matter. As the price of the right the city was at perfect liberty to demand that the charges for gas furnished the city and its inhabitants should not exceed certain prices. The appellee was at perfect liberty to reject or accept the city's proposal. The terms proposed on the one hand and accepted on the other made a contract as valid and enforceable as if made by two individuals. *City of Indianapolis v. Consumers Gas Trust Co.*, 140 Ind. 107, 116; *Western Paving, etc., Co. v. Citizens St. R. Co.*, 128 Ind. 525, 531, 25 Am. St. 462.

That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain.

There is no merit in appellee's contention that the ordinance contract of 1888 fails for want of consideration. Appellee's original franchise of 1886 was without restriction as to rates; and it could have continued to enjoy its franchise, and fix its own rates (if reasonable) if it had chosen to do so. By the ordinance of 1888 the city in effect proposed

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that any person, firm, or corporation, including appellee, desiring the use of its streets and alleys as a means of marketing natural gas, might have the same, by undertaking to abide by and perform all the conditions set forth, including the limitation upon prices for gas. Appellee was not required to accept the new proposition. It might have gone on without a contract for chargeable rates, and taken its chances of legal interference, or it might free itself of uncertainty by accepting the certainty of contract. It chose the latter course, accepted the ordinance, and for the first time had a contract and a legal authorization to charge the prices specified in the ordinance contract. This was a sufficient consideration.

But in its acceptance of the ordinance of 1888 appellee expressly reserved all vested rights under its franchise of 1886. One of these rights was to fix its own prices, within reasonable limits, for gas, and must be held to apply to all instances and uses of gas not specified in the ordinance of 1888; that is to say, under the facts shown, for all service, instances, and classes specified in the 1888 ordinance, appellee is not entitled to charge in excess of the rates fixed by that schedule, and for all service and uses of gas not specified in the ordinance of 1888 appellee is entitled to charge a reasonable price.

It is asserted by appellant that the complaint is bad, and exhibits no equity, for failure to aver that the prices charged by appellee for gas, not ruled by the ordinance of 1888, are reasonable. In the absence of any showing to the contrary, we must presume that they are reasonable.

Final judgment was entered on March 12, 1900, and on April 12, 1900, but at the same term, appellant filed its motion, supported by affidavits, to set aside the judgment, and for leave to file its answer. It is claimed that there was an abuse of discretion in the overruling of this motion. It appears that the complaint was filed January 6, 1900. On January 17th appellant, after having been duly summoned

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to answer the complaint, filed its demurrer thereto. The venue was then changed to the Clinton Circuit Court. A day was fixed in the latter court for argument on the demurrer. The regular attorney for the city and the attorneys for appellee went from Noblesville to Frankfort on the day fixed, and argued the demurrer, at the conclusion of which argument the court announced that he was inclined to overrule the demurrer, but would reserve his decision for further consideration, and would advise the attorneys interested when he was ready to rule. Whereupon the attorney for appellant announced that if the decision was adverse to the defendant it would stand by its demurrer and appeal to the Supreme Court. When ready, the judge gave the attorneys four or five days' notice of the time when he would give a decision upon the demurrer, indicating therein what the decision would be, and in response to which notice appellant's said attorney wrote the court to the effect that in view of its determination it would be unnecessary for him to be present, and requested the court to note an exception and show the granting of an appeal,—which was done.

This is an application to be relieved from a judgment, and to authorize the relief it is incumbent upon appellant to show that the judgment was taken against it through its mistake, inadvertence, surprise, or excusable neglect. §399 Burns 1894, §396 R. S. 1881 and Horner 1897. There is no effort made to justify the vacation of the judgment further than to show that the city's attorney, entrusted with the defense, failed to inform the council of the specific averments of the complaint, and that it had no knowledge of such averments, and the attorney's act in allowing judgment to go on demurrer was unauthorized and unknown to the city.

It is not shown that any of the city council ever inquired of their attorney about the averments of the complaint, or that the attorney was guilty of any fraud, or deception. It is, however, shown that the motion to set aside was signed and presented by other attorneys who were probably em-

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ployed in the case after the rendition of the judgment. There is no doubt, expressed or intimated, but that the city attorney, in all that he did with respect to the case, acted in good faith and in accordance with his best judgment; that other lawyers may differ with him as to the propriety of filing an answer and making a defense affords no ground for opening the case, as the question must be determined by the trial judge from the facts entering into and surrounding the case at the time of the rendition of the judgment. There was abundant time for the consideration of all questions of law and fact presented by the complaint. Every one is bound to vindicate his rights in due season, and to know at his peril the soundness and extent of his defense. The law allows him to make as many separate defenses as he chooses, but requires him to present them when his rights are assailed in a judicial proceeding, or be forever precluded. *Center Tp. v. Board, etc.*, 110 Ind. 579, 589; *Adams School Tp. v. Irwin*, 150 Ind. 12.

The court did not abuse its discretion in overruling the motion. Judgment affirmed.

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KOEPEKE, SHERIFF, v. HILL.

[No. 19,856. Filed June 21, 1901.]

**HABEAS CORPUS.** — *City Ordinance.* — *Constitutionality.* — *Collateral Attack.*—A judgment of the police court of Evansville convicting defendant for violation of a city ordinance is not void on account of the unconstitutionality of the ordinance, and the action of the circuit court in refusing to quash a writ of *habeas corpus* for the release of defendant, on the ground that the ordinance was unconstitutional, was erroneous.

From Vanderburgh Circuit Court; *H. A. Mattison*, Judge.

*Habeas corpus* by Paul C. Hill against Martin Koepke, as sheriff. From the action of the court in overruling a motion to quash the writ, defendant appeals. *Reversed.*

157	172
157	212

157	172
159	686

157	172
163	467

157	172
165	70

157	172
167	123

157	172
169	686
169	670



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*A. Gilchrist, C. A. De Bruler and D. C. Givens*, for appellant.

*F. B. Posey and D. Q. Chappell*, for appellee.

BAKER, J.—On his application for a writ of *habeas corpus* appellee was discharged from the custody of appellant as sheriff of Vanderburgh county.

The facts shown by the petition are these: In 1893 the legislature gave to cities of the class to which Evansville in Vanderburgh county belongs the right "to license, tax and regulate branch stores or establishments and all other concerns established in said city for temporary business only." §3927 Burns 1894. The city of Evansville in 1894 passed and promulgated an ordinance entitled "An ordinance to license, tax and regulate branch stores or establishments and all other concerns established in the city of Evansville for temporary business only." The first section declared "that it shall be unlawful to establish, conduct or maintain any branch store or establishment or any other store or concern in said city for temporary business only, without first procuring a license therefor." The second section fixed the license fee at \$25 a day for the first thirty days and \$10 a day for each day thereafter. The third section prescribed how an application for license should be made. The fourth section denounced the maintenance of branch or temporary stores without license and provided a fine for each day's violation. The fifth section declared an emergency. The sixth and last section repealed conflicting ordinances. In 1899 appellee, as agent of a Chicago house, opened in Evansville a temporary store for the sale of works of art. The business was innocuous to public morals. After appellee had conducted the business some time, twenty-six affidavits were filed in the police court of the city of Evansville, each charging that appellee on a day named "did violate sections three and four of an ordinance of said city, which ordinance was duly passed by the common council of said city on October 8, 1894, and duly published according to law on Oc-

tober 9 and 16, 1894, by then and there unlawfully establishing, locating, conducting and maintaining a temporary store for the sale of pictures and merchandise in the city of Evansville for temporary business only, without first procuring a license to do so". Warrants were issued, upon which appellee was arrested and brought before the court. He pleaded not guilty, was tried, convicted and sentenced in each case to pay a fine of \$10 and costs. On default of payment of the fines, mittimuses were issued, on which appellee was committed to the custody of appellant as sheriff, and the time of commitment had not expired when appellee's petition for *habeas corpus* was filed in the Vanderburgh Circuit Court. Appellee, in his petition, alleged "that his restraint is illegal in this, that said pretended ordinance is repugnant to the Constitution of the State of Indiana and to the Constitution of the United States, and is beyond the authority of the city of Evansville because no such power has been granted to it by its charter or the laws of the State."

Appellant's motion to quash the writ was overruled, and error is assigned on that ruling, among others.

Counsel for appellee very forcefully contend that the ordinance is invalid on the grounds stated in the petition. Counsel for appellant with equal vigor argue to the contrary, but first insist that the question as to the proper construction of the various constitutional provisions, and of the statutes conferring powers upon cities, and of the ordinance of the city of Evansville, was not open to investigation on *habeas corpus* proceedings. Whether or not this contention is true is a question that lies at the threshold of the case.

Section 1133 Burns 1894, §1119 R. S. 1881 and Horner 1897, provides that "no court or judge shall inquire into the legality of any judgment or process whereby the party is in his custody, or discharge him when the term of commitment has not expired, in either of the cases following:  
\* \* \* Second. Upon any process issued on any final judgment of a court of competent jurisdiction". The police

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court of the city of Evansville is a court of record, and the statute creating it expressly declares that "all its judgments, decrees, orders and proceedings shall have the same force and effect as those of the criminal or circuit courts, except that no judgment shall be a lien on real estate otherwise than is provided by taking transcript". Acts 1893, p. 65, *et seq.*, §113, §4017 Burns 1894; *Peters v. Koepke*, 156 Ind. 35. The police court of the city of Evansville has exclusive original jurisdiction of all violations of ordinances of the city and original concurrent jurisdiction with the circuit court in cases of certain felonies and misdemeanors. Acts 1893, p. 65, *et seq.*, §§115, 116, §§4019, 4020 Burns 1894; Acts 1895, p. 258, *et seq.*, §33, §4020 Burns Supp. 1897. It thus appears from the law of its creation that the police court of the city of Evansville was a competent court, and indeed the only competent court, in which to prosecute actions for violations of the city's ordinances.

No question arises in this case with respect to usurpation of authority by a court of inferior jurisdiction in acting in a matter outside of the charter of its powers, as if, for example, a justice of the peace, instead of binding over a party accused of murder to the criminal or circuit court for trial, should convict the accused and sentence him to be hanged. *Miller v. Snyder*, 6 Ind. 1. For the police court of Evansville, so far as the right to hear and determine a charge of violating an ordinance of the city is concerned, stands on as broad a footing as the circuit court of the county does in regard to the trial of an indictment for murder. The particular question, therefore, is this: Is the judgment of a court, which is the only tribunal before which the prosecutor can bring his charge of some alleged offense, void because the statute or ordinance that defines the offense is unconstitutional?

The Supreme Court of the United States and many of the state supreme courts answer the question in the affirmative. Church on Habeas Corpus (2nd ed.), §83; 15 Am. & Eng.

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Ency. of Law (2nd ed.) p. 204. In this State, however, the holdings have been to the effect that, whenever a court is confronted with a question which it has a right to decide correctly, its erroneous judgment will not be subject to a collateral attack, irrespective of whether the mistake of law concerned the common, or statutory, or constitutional law. *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90; *Cassel v. Scott*, 17 Ind. 514; *Wentworth v. Alexander*, 66 Ind. 39; *Lowery v. Howard*, 103 Ind. 440; *Willis v. Bayles*, 105 Ind. 363; *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. 658; *Board of Guardians v. Shutter*, 139 Ind. 268, 31 L. R. A. 740; *Jones v. Cullen*, 142 Ind. 335; *Hiatt v. Town of Darlington*, 152 Ind. 570; *Pritchett v. Cox*, 154 Ind. 108; *Winslow v. Green*, 155 Ind. 368; *Webber v. Harding*, 155 Ind. 408; *Peters v. Koepke*, 156 Ind. 35. In *McLaughlin v. Etchison*, *supra*, a judgment of conviction upon an affidavit which failed to charge a public offense was held to be impervious to a collateral assault. The failure to charge a public offense did not result from a deficient statement of facts. The facts were fully alleged. McLaughlin was charged with maintaining a public nuisance by erecting a high and useless fence which interfered with one Fraly's use of his own property. The mistake was with respect to the statutory law. There was no statute which denounced the acts done by McLaughlin as a public offense. And yet the court before which the charge was presented determined that there was. Surely, it is no greater a mistake of law to decide that a statute (unconstitutional in the opinion of some other tribunal) does not contravene the constitution than to hold that there is a statute which declares certain acts to constitute a public offense when there is no such statute. In *Cassel v. Scott*, *supra*, Cassel filed certain bonds in the auditor's office of Wayne county in compliance with an act "to regulate the retailing of spirituous liquors". The act was held to be unconstitutional in *Meshmeier v. State*, 11 Ind. 482. A judgment was obtained on Cassel's bonds, and he sought

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to enjoin the collection of the judgment. In the action on the bonds Cassel could have successfully maintained the defense of no consideration because the act was unconstitutional, but he was not permitted to attack the judgment collaterally. The common law, the statutes, and the constitutions make up the law of the land. They are all law. On principle, it is not perceived why a mistake in constitutional law should be visited with more serious consequences than a mistake in common or statutory law. "For if a person", as Judge Vanfleet says in §75 of his work on Collateral Attack, "should be tried on an information and be sentenced to be hanged, and the sentence should be confirmed and carried out by order of that court, and then the court, on further reflection, or by change of members, should come to a different conclusion in another case, and hold that in all such cases the constitution required an indictment, all persons engaged in the taking off of the first person would be guilty of manslaughter and liable for damages at the suit of his widow. \* \* \* When any court, with all the facts and all the law before it, deliberately orders some malefactor to be incarcerated, and compels the officers to carry out its sentence under pain of severe punishment upon refusal, and then as deliberately entertains an action by him against them for false imprisonment, because it has changed its mind on the law, it can hardly expect such officers or their friends to entertain a very high respect for it."

In this case an affidavit was presented to the police court of the city of Evansville, charging appellee with violations of a city ordinance. There was no other court of original jurisdiction in which the charge could be filed and determined. The court was in duty bound to act. It had to decide whether the facts stated made a case within the ordinance, and whether the ordinance was within the delegated legislative power of the city, and, if so, whether the ordinance and statute authorizing it conflicted with any provi-

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sion of the Constitution. These were all questions of law, and if the court had jurisdiction to decide them correctly, it likewise had jurisdiction to decide them erroneously. If the ordinance in question was an exercise of the police power, it might be held valid; if of the taxing power, invalid. That this one of the questions before the court was at least debatable may be seen by a comparison of the cases of *City of Indianapolis v. Bieler*, 138 Ind. 30, and *Pabst Brewing Co. v. City of Terre Haute*, 98 Fed. 330, wherein opposite conclusions were reached on the question whether a somewhat similar ordinance was an exercise of the police power or of the taxing power. If the police court had decided that this ordinance was an invalid exercise of the taxing power, and then the same or a higher tribunal had held the ordinance to be a valid exercise of the police power, it is conceivable that appellee might insist upon his former acquittal as a bar to another prosecution for the same acts, although the judgment of acquittal was founded wholly upon a mistake in constitutional law. The conclusion that a judgment under a statute which is erroneously held to be constitutional is not void, is supported by the cases of *People v. Jonas*, 173 Ill. 316, 50 N. E. 1051; *In the matter of Underwood*, 30 Mich. 502; *In the matter of Coffeen*, 38 Mich. 311; *In re Maguire*, 114 Mich. 80, 72 N. W. 15; *Ex parte Fisher*, 6 Neb. 309.

If a federal question were duly presented, we would be constrained to follow the decisions of the Supreme Court of the United States. But the averments of the petition disclose that the ordinance applies to residents and nonresidents without discrimination, and that the goods were within this State before and when offered for sale. The petition does not allege that the owners of the goods were not residents of this State. They may have resided here and owned a business in Chicago. No question of a denial of the equal protection of our laws, or of an interference with interstate commerce, is involved. *City of South Bend v. Martin*, 142

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Ind. 31, 29 L. R. A. 531; *City of Huntington v. Mahan*, 142 Ind. 695, 51 Am. St. 200; *Emert v. Missouri*, 156 U. S. 296.

Judgment reversed, with instructions to quash the writ.

## MORELL v. MORELL.

[No. 19,447. Filed June 25, 1901.]

**APPEAL.—Action to Establish Will.**—An action to secure the probate of an alleged will is an action to determine the property rights of living persons, and an appeal in such a case is not governed by §§2454, 2455 R. S. 1881, providing that appeals in matters connected with decedents estates must be perfected within forty days after final judgment. *p. 181.*

**EVIDENCE.—Hearsay.**—The rule that hearsay evidence must be excluded from the jury applies with equal force to statements made by one who has since died. *p. 182.*

**WILLS.—Probate.—Hearsay Evidence.**—Where it is sought to secure the probate of a will, both witnesses thereto being dead, it is improper to admit testimony as to statements made by one of the alleged witnesses in reference to the will's execution, although many years have passed, and it is impossible to procure better proof. *pp. 181-183.*

**EVIDENCE.—Handwriting.—Opinion.**—Where the genuineness of signatures of the testator and of deceased witnesses to a will is in issue, a witness who was a near relative of testator, and a neighbor of the two subscribing witnesses, had seen them write, had received letters from the testator, and was acquainted with the handwriting of each, is shown to have sufficient qualifications to entitle him to an opinion as to the genuineness of the signatures of all. *p. 184.*

**WILLS.—Action to Secure Probate.—Burden of Proof.**—In an action to secure the probate of an alleged will, the execution of which is denied, the burden of proof is on the plaintiff to establish its execution by a preponderance of the evidence. *pp. 184-187.*

From Huntington Circuit Court; *C. W. Watkins*, Judge.

Petition by David Morell for the probate of a will. From a judgment in favor of petitioner, Margaret Morell appeals. *Reversed.*

*T. R. Marshall, W. F. McNagny, P. H. Clugston, O. W. Whitelock* and *S. E. Cook*, for appellant.

*E. K. Strong, J. B. Kenner* and *U. S. Lesh*, for appellee.

157	179
162	385

157	179
f169	159
q169	162



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HADLEY, J.—Frederick Morell, a resident of Whitley county, died in 1893, childless, leaving appellant, a second wife, his widow and only heir at law. He left property, real and personal, of the value of from \$30,000 to \$50,000. The estate was administered upon by appellant and finally settled in 1894, and the real estate transferred to her name. July 28, 1897, there was filed with the clerk of the Whitley Circuit Court a paper purporting to be the last will of Frederick Morell, deceased, but no steps taken to probate it. February 9, 1898, appellee, who was named as executor in the will, filed his petition in the circuit court alleging therein the death of both the subscribing witnesses, purporting to be Matthew W. Pinkerton and Peter Franks, and praying for the probate of the will, and for an order to take the deposition of witnesses, to prove the signatures of the testator and subscribing witnesses. Appellant appeared, and in resistance of the probate filed her verified answer to the effect (1) that Frederick Morell did not make, sign, execute, or acknowledge said alleged last will; (2) said Matthew W. Pinkerton did not sign said alleged last will as a witness, and (3) that said Peter Franks did not sign said alleged last will as a witness. The venue was changed to the Huntington Circuit Court. Trial by jury. Verdict and judgment for appellee. The overruling of appellant's motion for a new trial is the only error assigned.

We are first confronted with the insistence of appellee that the appeal should be dismissed because not timely taken. The record was filed in this court forty-two days after final judgment, to wit, August 10, 1900. It is claimed that as the suit was pending and does not come within the operation of the amendatory act of 1899 (Acts 1899, p. 397), that it is governed by §§2609, 2610 Burns 1894, §§2454, 2455 R. S. 1881 and Horner 1897, relating to the settlement of decedents' estates, and which require the filing of an appeal bond within ten days after final judgment, and the transcript in this court within thirty days after the filing of the bond.



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It should be borne in mind that this is an action to establish an alleged will, the right to and procedure in which are given by the chapter relating to the subject of wills. §§2754, 2755 Burns 1894, §§2584, 2585 R. S. 1881 and Horner 1897. In effect it is an action to determine the property rights of living persons by establishing the evidence thereof, and when it has been fully and finally disposed of, the first step in the settlement of the estate yet remains to be taken under the provisions of the chapter relating to the settlement of decedents' estates. It is very clear that it is not a proceeding under the decedents' act, and it is firmly settled by a long line of decisions that the only cases governed by §§2609, 2610, *supra*, are such as originate and are prosecuted under the provisions of that act. *Galentine v. Wood*, 137 Ind. 532; *Harrison Nat. Bank v. Culbertson*, 147 Ind. 611; *Roach v. Clark*, 150 Ind. 93, and cases cited at p. 96, 65 Am. St. 353. The motion to dismiss the appeal is overruled.

Frederick Morell's mother, brother David, and married sisters resided in Wayne county, Ohio, where the decedent occasionally visited. His mother died and was buried in Wayne county, September 5, 1880. Frederick attended the funeral, and the proposed will bears that date. Pinkerton and Franks, the subscribing witnesses, both then resided in Wayne county. Appellee took the deposition of divers residents of Wayne county, among them that of one Hofacre. After testifying that he had a conversation with Peter Franks, a subscribing witness, in the autumn of 1880 or 1881, the following questions and answers were given: "Q. What conversation, if any, did you have with Peter Franks in respect to Frederick Morell? A. Well sir, Mr. Franks and I had a conversation, and he says: 'I witnessed a will that Frederick Morell from the west made, and David Morell, he appointed him administrator, and also Matthew W. Pinkerton was a witness.' Q. When was it that he told you this? A. It was in the fall of the year; the date and

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the year I could not exactly say. Q. With respect to Mrs. Morell's funeral, if that will enable you to state? A. It was after the funeral. There is one thing I want to explain to you. At the time of the death, or, I will say, the burial, I went there, but I can't say that was the time that Mr. Franks spoke to me. At the time Mr. Franks talked to me about this matter I know that David Morell's brother was present, but I won't say that it was directly after the death or some time after." Appellant's motion to strike out these questions and answers as being hearsay and self-serving was overruled, and the same were read to the jury.

Was Hofacre's narration of the statements made to him by Franks competent evidence? Hearsay is that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person. 1 Greenleaf on Ev. (15th ed.), §99. There is, perhaps, no rule more universally established than that hearsay evidence must be excluded from the jury. The reason is this, that the first speaker was not under the solemnity of an oath, and no opportunity is afforded the adverse party to cross-examine and develop the sincerity of the speaker, or the basis of the facts recited, thus presenting immoderate latitude to deception, mistake, and misapprehension. 1 Greenleaf on Ev. (15th ed.), §124; 15 Am. & Eng. Ency. of Law (2nd ed.) 310: As expressed by Greenleaf in §99, *supra*: "Its extrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." The reason for the rule remaining the same, the rule itself applies with equal force to statements made by one who has since died. *Welsh v. Barrett*, 15 Mass. 380, 386; *Crumpp v. Starke*, 23 Ark. 131, 135; *Hammel v. State*, 14 Tex. App. 326.

Appellee insists that the rule should yield to the peculiar facts of this case, namely, that the declaration was made a

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long time ago, near the time of making the will, the declarant dead, and had no interest, and that the evidence was rightly received on the ground of necessity arising from the impossibility of procuring better proof. No effort is made to bring the insistence within any of the recognized exceptions to the general rule. Without the sanction of some established legal principle, we have no warrant to sustain it. It is not perceived why the paucity of legal proof should furnish a reason for requiring a court to accept as proof that which is everywhere rejected as unreliable. Such is not the law. As phrased by an eminent author: "The rule [as to the exclusion of hearsay] applies also, notwithstanding that no better evidence is to be found, and though it be certain that, if the account is rejected, no other can possibly be obtained. As, where the evidence purports to be the narrative of an eye-witness to a transaction, and that witness was the only one, and he is since dead." 1 Phillips on Ev. (4th Am. ed.), p. 214.

That the evidence pertains to the establishing of a will makes no difference. The relation of Franks to the instrument was that of witness to the fact of execution; he was an eyewitness; he had no interest in the subject-matter; no concern as to the future disposition of the document. There was nothing about the transaction to stimulate him to care and caution in his statements concerning it, and it is perfectly clear that the narration of unsworn statements made by him nineteen years ago, concerning a matter of vital importance to the party offering the evidence, is open to all the mischiefs which lie at the base of the rule we are considering. A is upon trial for the murder of B. C was an eyewitness, and has since died. Can it be said to be competent for D to narrate to the jury what C had told him concerning the encounter? This question belongs to the same class. As illustrative of hearsay evidence see *Mershon v. State*, 51 Ind. 14; *Schooler v. State*, 57 Ind. 127; *Meyer v. Bell*, 65 Ind. 83; *Reynolds v. Copeland*, 71 Ind. 422;

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*Ricketts v. Harvey*, 78 Ind. 152, 156; *Simpkins v. Smith*, 94 Ind. 470, 474; *De Pew v. Robinson*, 95 Ind. 109, 112. The motion to strike out the above questions and answers should have been sustained.

Complaint is also made of the refusal of the court to strike out certain parts of the depositions of Fred Mettatel and Samantha Smedley relating to their competency to testify to the genuineness of the signatures appearing upon the will. Mettatel testified to each of the three signatures. It was previously shown that he was the nephew of Frederick Morell and the neighbor of both the subscribing witnesses; had seen each of them write; received letters from his uncle, and was acquainted with the handwriting of each. Mrs. Smedley was the daughter of Peter Franks, had seen him write many times, and was acquainted with his writing. She testified only to her father's signature. We think these witnesses showed sufficient qualifications to entitle them to an opinion. The fact that in their general answers each of them volunteered a mention of recent comparison with other signatures by the same person was not sufficient as against their specific answers to disqualify them. The motion to strike out, so far as it related to the depositions of Fred Mettatel and Samantha Smedley, was properly overruled.

There are several questions arising upon the admission and exclusion of evidence which are not likely to arise again upon a retrial which we pass without consideration.

Appellant further contends that the court erred in giving to the jury upon request of appellee, instructions three and four, which read thus: "(3) Under the issues in this case the burden was on the plaintiff, David Morell, to prove the signatures of the subscribing witnesses to the will read in evidence or the signature of the testator, Frederick Morell, and after having produced proof of such signatures, the burden shifted to the contestants, Margaret Morell, to establish by a preponderance of the evidence that Frederick Morell did not execute the will in question. (4) After the plain-

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tiff, David Morell, had adduced sufficient proof of the handwriting of the subscribing witnesses and the handwriting of the testator, Frederick Morell, to authorize the reading of said will in evidence, this made out a *prima facie* case, and the burden of proof shifted to the contestant, Margaret Morell, to overthrow such *prima facie* case by a preponderance of the testimony.”

It should be remembered that the issue formed is under §2765 Burns 1894, §2595 R. S. 1881 and Horner 1897. The contest is over the probate of the instrument as the will of Frederick Morell. On the one hand appellee asserts that the paper presented by him was executed by Morell as his last will, and asks that the same may be legally established as such. On the other hand, appellant denies, under oath, that Morell executed it. The one affirms, the other denies. This presents a simple issue of *non est factum* triable by the court, or jury, with the burden resting upon the proponent, who seeks affirmative relief. However this issue may be determined, as between the parties, the controversy over the will is at an end. There can be no further contest under §2766, *supra*. The parties have had their day in court. *Duckworth v. Hibbs*, 38 Ind. 78.

The right to resist the probate and to contest a will is given by statute, and can be exercised only in the mode prescribed. *Harrison v. Stanton*, 146 Ind. 366.

The difference in the nature of the two rights and in the mode of procedure for enforcement is plain. The probate of a will, under §2765, impresses it with *prima facie* validity. This means that it will stand as a valid instrument in the absence of affirmative extrinsic proof brought against it, sufficient to overcome the legal presumption with which it is clothed. Therefore in an action to contest, after probate, under §2766, the plaintiff, very logically and rightfully, has the burden of proof; but when, as in this case, the admission to probate is made the issue, calling in question, by a sworn answer, the integrity of the document, and it comes to the

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court for trial, devoid of any legal presumption in its favor, it seems to us that the question of fact must be tried and determined like any other question of fact, under established rules of evidence and procedure. It is clear that if the probate was resisted on the ground that the testator was of unsound mind at the time he executed the will, or that its execution was procured by undue influence, or fraud, each of which implies actual execution, the burden of these issues would rest upon the party affirming them, but in this case the sole question is: Did Frederick Morell execute the will? Is it a forgery? And the defense is purely and wholly negative. If the proponent fails to prove what he affirms by a preponderance the instrument will be rejected as a will. If he succeeds, it will be admitted to probate, not as a *prima facie* will, but, between the parties, as an absolute verity.

It follows from what we have said that each of the instructions complained of is erroneous. Number three, in substance, informed the jury that the burden was upon the proponent to prove the signatures of the subscribing witnesses or the signature of Frederick Morell, and, having made such proof, the burden shifted to Margaret Morell to establish by a preponderance of the evidence that Frederick Morell did not execute the will in question. The character of the proceeding must be kept in view. If this were an *ex parte* proceeding to establish a *prima facie* will, proof of the signatures of the subscribing witnesses, or proof of the signature of the testator, would have been sufficient §2754 Burns 1894, but here we have a contested issue involving not the *prima facie* but the real character of the paper, the substance of which is the signing of the instrument by Frederick Morell and its attestation by the subscribing witnesses, and proof of the genuineness of the signatures of the subscribing witnesses in no sense proved, or tended to prove, the genuineness of the signature of Morell. The signatures of the subscribing witnesses might have been genuine, and that of the testator an absolute forgery. Under the issue, the burden was upon the

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proponent to prove the genuineness of the signatures, or the authority to make them, of each the testator and subscribing witnesses, and the instruction as given was misleading. Besides in no state of the proof could the burden be said to shift from the party having the affirmative of the issue to the other side. *Young v. Miller*, 145 Ind. 652; *Roller v. Kling*, 150 Ind. 159; *Merriman v. Merriman*, 153 Ind. 631.

Number four in substance is the same as number three, and is subject to the same objections.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

## RICHARDSON, ADMINISTRATRIX, v. DAWSON.

[No. 19,824. Filed June 26, 1901.]

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157	509

APPEAL AND ERROR.—*Record*.—*Evidence*.—Where there is no order-book entry showing the filing of any bill of exceptions, and the certificate of the clerk contains nothing in reference to the incorporation of an original bill of exceptions containing the evidence, the evidence is not in the record, though what purports to be a transcript of the testimony is attached thereto. *p. 188.*

SAME.—*Record*.—*Evidence*.—Questions as to the admissibility of evidence and as to instructions can not be considered on appeal, where the evidence is not in the record. *p. 188.*

From Morgan Circuit Court; *G. W. Grubbs*, Judge.

Action by Charlotte Richardson, as administratrix, against Byron Dawson. From a judgment for defendant, plaintiff appeals. *Affirmed.*

*W. Eldridge* and *E. F. Barker*, for appellant.

*W. L. Taylor* and *Floyd Woods*, for appellee.

BAKER, J.—Appellant unsuccessfully prosecuted this action as administratrix of the estate of her deceased husband to recover \$10,000 against appellee for wrongfully causing his death. The only error assigned is the overruling of the motion for a new trial. The grounds of the motion relate exclusively to the admissibility and sufficiency of the evi-

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dence and to the correctness of the instructions. No attempt has been made in any way to bring the instructions into the record.

The transcript contains copies of the pleadings, motion for a new trial, order-book entries in connection therewith, and the final judgment. Then follows the certificate of the clerk that the foregoing is a full, true, and correct copy of the records and judgment of the court in the above entitled cause. Next succeeding this is the assignment of errors signed by appellant's attorneys. Following the assignment of errors, there are attached many pages of what appears to be a transcription of the testimony in some case. This cannot be taken as a bill of exceptions containing the evidence in this case, because there is no order-book entry showing the filing of any bill of exceptions, and also because the certificate of the clerk contains nothing in reference to the incorporation of an original bill of exceptions containing the evidence into the transcript. The manner in which this transcript was prepared is identical in all particulars with that in the case of *Shewalter v. Bergman*, 132 Ind. 556. Inasmuch as the evidence is not in the record, no question is presented. *Harris v. State*, 155 Ind. 15; *Ewbank's Manual*, §32. Judgment affirmed.

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JEWELL ET AL. v. GAYLOR ET AL.

[No. 19,441. Filed June 26, 1901.]

DESCENT AND DISTRIBUTION.—*Action Between Heirs.—Complaint.*—

In an action by heirs against certain other heirs to recover the value of property alleged to have been procured by defendants from decedent by fraudulent means, a complaint averring that there are no debts against the estate, but which fails to allege that there is no executor, administrator, widow or other person entitled to control or share in the claim sued on, is insufficient to withstand a demurrer.

From St. Joseph Circuit Court; *Lucian Hubbard*, Judge.

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Action by William M. Jewell and others against Albert Gaylor and others. From a judgment in favor of defendants, plaintiffs appeal. *Affirmed.*

*Wilbert Ward* and *J. S. Dodge*, for appellants.

*A. Anderson*, *J. DuShane* and *W. G. Crabill*, for appellees.

MONKS, C. J.—Appellants, grandchildren and heirs of Jacob M. Gaylor, deceased, brought this action against appellees, children and heirs of said deceased, to recover \$8,000 for certain personal property alleged to have been procured by appellees from the deceased by fraudulent means, and for money received by appellees for real estate which they by means of undue influence induced said decedent to sell and convey, and for damages on account of their having executed deeds in the name of said John M. Gaylor without his knowledge or consent for certain real estate owned by him. The separate demurrers of appellees to the complaint were sustained, and judgment rendered against appellants.

The complaint proceeds upon the theory that appellees as heirs of Jacob M. Gaylor, deceased, are entitled to recover a money judgment against the other heirs of said deceased on the facts alleged upon the ground that there are no debts against the estate. They insist that when there are no debts to be paid, the estate may be settled without administration, and the heirs are entitled to the estate and may bring any kind of an action to recover the same. That their right to recover does not depend upon whether or not there is an administrator or executor, but upon the fact whether or not there are any debts of the estate to be paid. Citing *Salter v. Salter*, 98 Ind. 522; *Waltz v. Waltz*, 84 Ind. 403; *Church v. Grand Rapids, etc., R. Co.*, 70 Ind. 161.

It is true that the heirs may under certain circumstances sue upon and collect claims belonging to the decedent, but these circumstances must be set forth in the complaint. *Indianapolis, etc., R. Co. v. Price*, 153 Ind. 31, and cases cited.

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To recover, the heirs must allege and prove that there is no executor, administrator, creditor, widow or other person entitled to control or share in the claim sued upon. *Church v. Grand Rapids, etc., R. Co.*, 70 Ind. 161, 165; *Schneider v. Piessner*, 54 Ind. 524; *Bearss v. Montgomery*, 46 Ind. 544; *Walpole v. Bishop*, 31 Ind. 156; *Salter v. Salter*, 98 Ind. 522, and cases cited.

The only averment in the complaint on the subject is that there are no debts against the estate, and so far as the complaint is concerned there may be a widow, an executor, administrator or other person entitled to control or share in the claims sued upon.

The court did not err, therefore, in sustaining a demurrer to each paragraph of the complaint. Judgment affirmed.

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BANKS v. THE STATE.

[No. 19,599. Filed June 26, 1901.]

**BRIBERY.—Attempt to Bribe Election Judge.—Information.**—In a prosecution for attempting to bribe one who had previously been designated as an election judge of a certain precinct, an information is defective which fails to state by whom the alleged election judge had been designated for appointment, or by what authority such designation had been made. *pp. 191-198.*

**CRIMINAL LAW.—Bribery.—Evidence.—Res Gestae.—Intent.**—Where the theory of defense of one charged with an attempt to bribe an election judge to sell an official ballot was that the accused made the offer in pursuance of a prearranged plan to have such judge produce the ballot, and then have him arrested, the conversation between defendant and a third party in devising such plan is admissible in evidence as a part of the *res gestae*, and also for the purpose of rebutting the allegation of intent. *pp. 198-205.*

From Marion Criminal Court; *Fremont Alford*, Judge.

From a conviction for attempting to bribe an election judge, defendant appeals. *Reversed.*

*J. E. McCullough* and *J. J. Rochford*, for appellant.

*W. L. Taylor*, Attorney-General, and *J. C. Ruckelshaus*, for State.

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JORDAN, J.—Appellant was tried before a jury and convicted in the Marion Criminal Court on an affidavit and information which charged that he had attempted on November 5, 1900, to bribe one J. Wesley Bridges, who had been designated as an election judge to serve as such in precinct sixteen in the city of Indianapolis, at the general election to be held on the 6th day of November, 1900. His motion for a new trial was overruled, and upon the verdict of the jury the court sentenced him to be imprisoned in the Indiana state prison for an indeterminate period of time of from two to fourteen years, and adjudged that he be fined in the sum of \$1, and disfranchised, etc. From this judgment he has appealed, and bases the errors of which he complains upon the rulings of the trial court, (1) in denying his motion to quash the affidavit and information, (2) in overruling his motion in arrest of judgment, and (3) in overruling his motion for a new trial. The information in its averments is the same as the affidavit, and, omitting the formal parts, is as follows: "John C. Ruckelshaus, prosecuting attorney of the nineteenth judicial circuit, who prosecutes the pleas of the State within and for the county of Marion, and State of Indiana, now informs the court that John Banks, on the 5th day of November, A. D. 1900, at and in the county of Marion, and State of Indiana, did then and there unlawfully, feloniously, and corruptly offer to one J. Wesley Bridges, who was then and there, and who had theretofore been designated as one of the election board of the sixteenth precinct of the first ward in the city of Indianapolis, in Marion county, and State of Indiana, to wit, one of the judges of said election board, at and for the general election to be then and there held for the election of State, county, and township officers at the general election to be held on the 6th day of November, A. D. 1900, with intent then and there to corrupt and influence him, the said J. Wesley Bridges, with respect to the discharge of his duties as such judge of said election board, he, the

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said John Banks, then and there well knowing that the said J. Wesley Bridges was then and there and had theretofore been designated as such judge of said election board, the sum of \$50, of the legal and current money of the United States of America, for one of the ballots to be used at said election in said precinct, and the said J. Wesley Bridges was then and there and had theretofore been a resident householder in and of said sixteenth precinct of the first ward of said city of Indianapolis for more than two years next preceding said election on said 6th day of November, 1900, and who then and there was duly qualified to act as such judge of said election board, and did, then and there, unlawfully, feloniously, and corruptly offer to him, the said J. Wesley Bridges, with intent then and there and thereby to corrupt and influence him, the said J. Wesley Bridges, with respect to the discharge of his duties as such judge of said election board the sum of \$50, of the legal and current money of the United States of America, for such ballot, the same to be then and there delivered to him, the said John Banks, by the said J. Wesley Bridges on the 6th day of November, 1900, after the opening of the polls of said precinct at said election on said 6th day of November, 1900; the said ballot for which the said John Banks then and there unlawfully, feloniously, and corruptly offered the said sum of \$50 to the said J. Wesley Bridges as aforesaid was to be one of the legal and regular ballots delivered to the inspector of said election board of said precinct, and to be used and voted at said election in said precinct by the voters thereof. And the said John Banks then and there unlawfully, feloniously, and corruptly offered the said sum of \$50, of the legal and current money of the United States of America as aforesaid, to be then and there paid over to the said J. Wesley Bridges by the said John Banks upon the delivery of said ballot to him, the said John Banks, after the opening of the polls at said precinct, on the said 6th day of November, 1900, and which said ballot, for which said

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sum of money was offered by the said John Banks to the said J. Wesley Bridges as aforesaid was to be removed by the said J. Wesley Bridges from the place where the said election was to be held in and for said precinct, contrary to the form of the statute," etc.

The prosecution is based on §105 of the criminal code, the same being §2097 Burns 1894, §2010 R. S. 1881 and Horner 1897, which reads as follows: "Whoever, with intent to corrupt a grand or petit juror, or a grand or petit jury, referee, master commissioner, arbitrator, umpire, commissioner to sell lands or make partition of lands, appraiser of real or personal property, county commissioner, mayor of a city, or member of a common council of any city, or trustee of any incorporated town, trustee of any civil or school township, or any inspector, judge, or clerk of election; or, to influence him or them with respect to the discharge of his or their duty, either before or after he or they are summoned, elected, appointed, qualified or sworn, promises or offers him or them any money or valuable thing \* \* \* shall be imprisoned in the State prison," etc.

Counsel for appellant contend that the affidavit and information are fatally defective and insufficient for the reason, among others, that they do not disclose under whose or by what authority Bridges had been designated for the appointment of election judge to serve as such at said general election at the precinct mentioned in the information. By §4688 Horner 1897, §6200 Burns Supp. 1897, it is made the duty of an inspector of elections in his respective precinct, prior to the opening of the polls, to appoint two qualified electors of such precinct as judges of the election to be held therein. The section provides that such electors in order to be qualified to serve as judges in their precincts must have been "freeholders and resident householders therein for at least one year, or householders for at least two years next preceding such election, and who are members of differ-

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ent political parties and of the parties which cast the highest number of votes in the State at the preceding general election: \* \* \* Provided further, That if at least one week or more prior to such election the chairman of the county central committee of either of the two parties that cast the largest number of votes in the State at the last general election shall designate a member of such party as judge, having the same qualifications as above prescribed, he shall be appointed, and such judges, together with the inspector, shall constitute a board of election." This is the only provision of our election law which expressly provides for designating or making known for a week or more in advance of the election day the names of the persons who have been selected by the prescribed chairmen, to be presented to the inspector for the appointment as judges on the election board. If the chairman of the county central committee of either of the two specified political parties shall at least a week before the election day designate some qualified elector of the precinct who is a member of the same political party to which such chairman belongs, to serve as judge at said election, then, under such circumstances, it becomes the imperative duty of the election inspector of such precinct to appoint the person so designated as election judge, provided the person so designated is not disqualified by reason of his being a candidate to be voted for at said election, or because he is related to some candidate, or by reason of having something of value bet or wagered upon the result of the election, as prohibited by the above section. If, however, such designation is made, but not within the time fixed by the statute, the appointment of the person as judge then, under the circumstances, becomes a matter of discretion with the inspector, and the latter may or may not appoint the person so designated as he in his judgment may deem to be proper. Where the person duly qualified has been designated for judge under the authority and within the time provided by the statute, certainly then it may be assumed by all persons

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having knowledge thereof that the inspector will discharge his duty by appointing the person as such judge who has been designated by the proper authority. If such designation is made, but not within the prescribed time, then, under such circumstances, there can be said to exist only a mere probability that the inspector will, in the exercise of his discretion, appoint the person so designated. The pleader in drafting the information in this case evidently had in mind the provision of the election law to which we have referred. The offense is charged to have been committed on November 5, 1900, which was the day immediately preceding the general election of that year. The pleading charges that Bridges "had theretofore been designated as one of the election board of the sixteenth precinct of the first ward in the city of Indianapolis, \* \* \* to wit, one of the judges of said election board" for the general election to be held on the 6th day of November, 1900. It is further averred that at the time the accused offered the alleged bribe, he knew that Bridges "was then and there and had theretofore been designated as such judge of said election board." The information is entirely silent in respect either to the person by whom Bridges had been theretofore designated for the appointment of judge or under or by what authority such designation had been made. In regard to this feature of the case the pleading in no manner apprises the accused of what he will be required to meet on the trial in regard to such issue. For aught appearing to the contrary in the information Bridges, instead of being designated by the chairman of the county central committee of either the Republican party or Democrat party, which we judicially know are the two political parties that cast the largest number of votes in this State at the general election last preceding the one held on November 6, 1900, may have been designated by the county chairman of some political party other than those mentioned, or by some one who in no manner had any right or authority to nominate or designate him for such appointment. Aside

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from the naked statement that he had been "theretofore" designated, there are no positive averments disclosing anything which may have caused the accused to assume or believe that there was even a probability of Bridges being appointed one of the election judges to serve as such on the election board at the precinct as specified. It does not appear that he had been designated either by the proper chairman or that he had in any manner been designated by the inspector in advance of the day of election for the appointment as election judge. There is an entire absence of facts to show that there was even a probability of his being appointed as judge on the election board at the election in question. The statute on which this prosecution rests makes it a public offense for any person to promise or offer to any judge of election either before or after his appointment, any money or thing of value, with the intent to corrupt or influence him with respect to the discharge of his official duty. Where the corrupt offer or promise is made before the appointment, it must be made to corrupt or influence such judge in the discharge of some one or more of the duties which will devolve upon him after his appointment as such official. One of the objects of the statute is to shield him from the evil efforts or attempts of the briber or corruptor from the very time it becomes known that there is even a probability of his appointment as such judge or that he may become invested with the discharge of the duties of the particular office. Where the corrupt offer or promise has been made for the purpose mentioned in the statute, the fact that the person attempted to be bribed fails to secure the appointment will not relieve the guilty party of the offense. Bridges may have been duly qualified as required by the statute to serve as election judge, and it may also be true that he had been theretofore designated, as alleged, still he may have been designated for the position by some unauthorized or incompetent person, for instance, by the county chairman of either the Prohibition party or the Populist party. Had



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he been designated by the county chairman of either of the latter political parties, no one, under such circumstances, could assume or believe that there was a probability of the inspector violating the law and appointing him as one of the judges of the ensuing election. The fact, under such circumstances, that he had been designated by such incompetent or unauthorized person would certainly go to rebut the intent with which, as charged, the particular bribe had been offered or promised. Where the offense is committed after the appointment of the judge by the inspector, knowledge by the accused of his official character at the time the bribe was given, promised, or offered, is an essential element, which must be alleged and proved. Bishop on Crim. Proc., §126; *Schmidt v. State*, 78 Ind. 41; *Pettibone v. United States*, 148 U. S. 197, 202, 13 Sup. Ct. 542, 37 L. Ed. 419; *United States v. Kessel*, 62 Fed. 57; *People v. Ward*, 110 Cal. 369, 42 Pac. 894; *Brown v. State*, 13 Tex. App. 358; *State v. Howard*, 66 Minn. 309, 68 N. W. 1096, 34 L. R. A. 178. In fact, all the precedents or forms of indictment for bribing public officers or jurors, from Chitty to Bishop, contain positive and direct averments of the knowledge of the defendant in the "premises." 3 Chitty on Crim. Law 696; Bishop's Directions and Forms, §247.

If it is essential, where the offense is committed after the appointment or election of the particular officer, that knowledge of his official character at the time of its alleged commission should be imputed to the defendant, it is certainly material and important that where the crime is charged to have been committed before the appointment or election of the person to the position in controversy, that knowledge of the fact that he had been nominated or designated by competent authority should be imputed to the defendant at the time of the alleged commission of the offense. For as previously said it ought to be made to appear that the accused had reasonable grounds to believe or contemplate that there was at least a probability of the person whom he bribed, or

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attempted to bribe, being elected or appointed to the particular office or position in controversy. The information in this case in regard to the particular point in question is so uncertain that it can not be determined what evidence would be admissible thereunder to establish the issuable fact that Bridges had been designated for the appointment of election judge, and, hence, did not sufficiently apprise appellant in this respect of what he might be expected to meet at his trial. Where a criminal pleading is so uncertain or doubtful under its material averments as to be open to more than one construction it should be construed most strongly against the State, and all reasonable doubts arising from such averments ought to be solved in favor of the defendant.

The rule in regard to criminal pleading requires that the offense be positively charged, and not made to appear by the way of recitals or inferences. Nothing is to be gained by courts permitting a departure from well settled principles and lending their sanction to a loose and uncertain mode of pleading in criminal cases.

In *Funk v. State*, 149 Ind. 338, we said: "The doctrine so frequently asserted and adhered to by this court is that the particular crime with which the accused is charged must be preferred with such reasonable certainty by the essential averments in the pleading as will enable the court and jury to distinctly understand what is to be tried and determined, and fully inform the defendant of the particular charge which he is required to meet. The averments must be so clear and distinct that there may be no difficulty in determining what evidence is admissible thereunder." We conclude, therefore, for the reasons urged and stated herein, that the information is fatally defective. As to whether it is sufficient in other respects we do not decide. It follows that the court erred in overruling appellant's motion to quash the affidavit and information.

It is further contended that the court erred in excluding certain evidence offered in behalf of appellant. The latter,

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while upon the witness stand, denied that he had in any manner attempted to bribe the prosecuting witness. He testified that he did not know that Bridges had been designated for election judge, or that he would be appointed as such. In fact the entire theory of appellant's defense was to the effect that he made the offer of the money in question to Bridges on November 5, 1900, at the time and upon the occasion when, as the latter testified upon the trial, the attempt to bribe him was made. That he offered to give the money to Bridges for the sole purpose of ascertaining whether the latter then had in his possession one of the ballots to be used at the coming election, and thereby induce him to show the ballot. He claimed that the money was not offered with the intent to influence Bridges in his conduct or duties after he became an election judge. The claim which appellant made while upon the stand as a witness in his own behalf was that, under an arrangement, he was only endeavoring to ascertain the fact as to whether Bridges had the ballot in his possession at the time, and if he had he was to be arrested for a violation of the election law. He testified that in a conversation which he had with Bridges on October 28, 1900, and also on November 4th following, that the latter informed him that he could obtain one of the ballots to be used at the election and have it ready to deliver to appellant on November 5th; that he went to Bridges' place of business in the city of Indianapolis on Monday morning, November 5th, to see if Bridges had the ballot, as the latter had promised to obtain it. Appellant further testified that in the first conversation which he had with Bridges, on October 28th, the latter said to him, that if he could deal with the right kind of people he was willing to make some money, and also said in the same conversation that "They got out some ballots at the city election before", and then said to appellant: "How much would you people be willing to give me for a ballot?" to which inquiry appellant replied that he did not know and could not say, that he would have

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to see about the matter. On the night of October 28th, appellant testified that he again saw Bridges, and the latter inquired what he had done in respect to the proposition which he had made him about procuring a ballot, and appellant replied that he would let him know further, saying "I havn't had time to see my people." On the next day after the conversation which appellant had with Bridges on the 28th, he, as his evidence discloses, informed a Mr. Polster about the conversation which he had with Bridges in regard to the ballot, and on the same day he saw Mr. Thomas Taggart, who was the mayor of the city of Indianapolis, and reported to him in respect to the conversation which had occurred between him and Bridges on the 28th of October, and that he and the mayor, upon that occasion, talked over the matter. On being asked to tell or state what Mayor Taggart said to him on that occasion in regard to the matter the State objected. Thereupon Mr. McCullough, counsel for appellant, stated to the court what he proposed and expected to show by the witness in response to the question, the offer being as follows: "Mr. McCullough: I expect to show by the witness, in answer to the question, that Mayor Taggart said at that time in effect: 'Keep your ears open and listen to him and find out if he has got a ballot. If he has got a ballot, we will go after him and the ballot both very quick, and if it is necessary to have any money for the purpose of having him disclose the ballot I will furnish the money. I will see that the man is taken with the ballot in his possession if he has one; he has no business with a ballot.' I expect to follow this testimony of the witness by other evidence in the case showing that on the next Sunday the witness, Bridges, began talking to this man about the question of a ballot, and that on that night the fact was again communicated to Mayor Taggart, as well as to other officers, and that they went with the witness and told him that any money would be furnished that was necessary for the purpose of inducing Bridges to produce a ballot, if he had one, and it was in pursuance of

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these directions that he was acting. The Court: The evidence of Mayor Taggart is hearsay evidence. The only part that is competent is whether he received any direction from Mayor Taggart. He may so state if he did; otherwise it is hearsay evidence. Mr. McCullough: I am asking whether he gave him any direction. The Court: You are asking him what he said, and the court sustains the objection. You may ask whether Mayor Taggart gave him any direction. If he got any direction from Mayor Taggart he can answer yes or no." To this ruling of the court in excluding this evidence appellant by counsel at the time excepted, and the ruling thereon is one of the reasons assigned in the motion for a new trial.

Mayor Taggart, who was called as a witness in behalf of appellant, testified that on Monday, October 29, 1900, appellant came to him and talked to him about what had previously occurred between him and Bridges, and in that conversation the witness stated that he informed or advised appellant what to do in respect to ascertaining if Bridges had a ballot. Thereupon the witness was asked to state what was said by him to appellant in that conversation on that subject. The State interposed an objection, and counsel for appellant stated to the court what he expected to show and proposed to prove by the witness in response to the question as follows: "Mr. McCullough: I expect the witness to answer that in that conversation he said to Banks, in substance, 'Keep your ears open, and listen to that man and find out if he has got a ballot. If he has got a ballot, we will go after him and the ballot both very quick, and if necessary to have money for the purpose of having him disclose the ballot, I will furnish the money. I will see that he is taken with the ballot in his possession if he has one. He has no business with a ballot. You must not receive the ballot from him, but ascertain if he has one.' " The court sustained the State's objection, and excluded the evidence offered, to which ruling appellant at the time excepted, and this ruling is also assigned as one of the reasons for a new trial.

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The court also refused to permit the witness Taggart to testify that on the morning of November 5, 1900, he made the following statement in reference to the same matter between appellant and Bridges. The offer to prove being as follows: "Mr. McCullough: I expect to prove by the witness in answer to the question that he then and there said to Cramer in the presence of the defendant, Banks, that if that man, meaning Bridges, had a ballot, we want him, and we want him with it on his person, and then handed to Cramer \$50, and told him that he, the Mayor, would have three men go up there where Banks was to meet Bridges; that is, another officer besides Cramer to go with Cramer and Banks; that the other officer would meet them at the court-house as they went by there; that when Banks got to where Bridges was, if it became necessary to get Bridges to show the ballot, he, Banks, should show Bridges the \$50 with which he could buy it, but that Banks must not receive the ballot, that Bridges must be arrested with it on his person; that the three persons who were to go up there must arrange among themselves so that if Bridges produced or showed a ballot to Banks, he, Banks, should give a sign to him and the other officer and they must go at once and arrest Bridges with the ballot on his person."

It was the right of appellant to have the jury fully informed in regard to all of the facts and circumstances pertinent to the arrangement or scheme under and in pursuance of which he claimed to have acted in offering the money in question to Bridges. Such evidence would not only include what he himself did in respect to the matter, but, under the circumstances, it would embrace what Taggart told him or advised him to do after appellant had reported to him, as he stated he did, in reference to and in the furtherance of the arrangement or scheme by which Bridges was to be exposed and then arrested. As said, this was the scheme or arrangement under and in pursuance of which, as claimed by appellant, he thereafter acted in offering or promising the money

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to Bridges on the occasion in controversy. The claim made by appellant in explanation of his action was to the effect that when he had ascertained that Bridges had in his possession on November 5th the ballot which he had promised to obtain or procure, that then, under said arrangement between him and Taggart, he was to give a certain signal to two policemen who would be stationed near by and that these officers thereupon were to arrest Bridges with the ballot in his possession. Appellant was certainly entitled fully to sustain or make plausible his theory of defense, and if the jury believed the evidence relating thereto to be true, or if they entertained a reasonable doubt of its truth, an acquittal of appellant would necessarily follow. For if there was a reasonable hypothesis disclosed by any evidence in the case which was consistent with the innocence of the accused, it was the duty of the jury to acquit him. *Green v. State*, 154 Ind. 655.

It was not the right of the court under the circumstances in this case to confine appellant to the mere statement that he had received directions or advice from Mayor Taggart in regard to the matter between him and Bridges, but he was entitled to show what Taggart said to him or in his presence in giving him the directions or advice in respect to what he should do when he met with Bridges upon the occasion in question. The facts which appellant offered to prove, but which were excluded by the court, were germane to the question involved. What was said by appellant and Taggart in making the arrangement in regard to the matter and in the furtherance thereof was a part of the *res gestae*, and such statements or declarations, under the circumstances, were proper to go to the jury to show the character of the transaction in all of its aspects. It is the right of a party in either a civil or criminal prosecution to endeavor to maintain his theory of the case, and for that purpose he should be permitted to give to the jury any and all competent evidence which tends to support the same; and where any evidence



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has been introduced which tends to sustain such theory, it is also his right to have the jury fully advised upon the law in relation thereto by proper instructions. *Cleveland, etc., R. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. 644, and authorities there cited. *Carpenter v. State*, 43 Ind. 371; *Grimes v. State*, 68 Ind. 193; *Norris v. State*, 95 Ind. 73, 48 Am. Rep. 700.

It was incumbent upon the State, among other things, to sustain beyond a reasonable doubt the intent with which appellant was charged to have offered the money to Bridges. It was consequently the right of appellant to endeavor to explain or rebut such intent upon any reasonable theory or claim, and the action of the court in excluding from the jury the evidence in dispute falls clearly within the rule asserted and enforced in *Grimes v. State*, 68 Ind. 193, and *Norris v. State*, 95 Ind. 73. In the first case last cited the defendant was indicted for larceny and the evidence established that he had borrowed the chattel alleged to have been stolen to take it to a certain place; that he had then gone to a different place and there sold the chattel and used the proceeds. It was held by the court in that case that it was competent for the defendant to prove, as bearing on his intent in borrowing the chattel, that he had previously arranged to go with another to such first mentioned place, and that he did not go there because of the fact that such other person was prevented by sickness from going with him. In the last case, *Norris v. State, supra*, the defendant was indicted for the crime of blackmailing, by sending a threatening letter to another to extort money. The theory of the defense was that the letter was sent as a joke, and there was an offer to prove that shortly before defendant sent the letter to the party in question that the latter had perpetrated several severe jokes upon him. His offer to prove these facts was denied, and on appeal this court held that the evidence was admissible upon the question of intent.

It must follow, from what we have said, that the trial



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court erred in excluding the evidence offered. For the errors pointed out in this opinion, the judgment is reversed, and the cause is ordered to be remanded to the lower court with instructions to grant appellant a new trial and to sustain his motion to quash the affidavit and information. The clerk will issue the proper warrant for the return of the prisoner to the custody of the sheriff of Marion county.

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GORMAN ET AL. v. THE STATE EX REL. KOESTER.

[No. 19,828. Filed June 27, 1901.]

MUNICIPAL CORPORATIONS.—*Assessment for Street Improvements.—Modification by Board of Public Works.—Mandamus.*—Under §3981 Burns Supp. 1897, providing the manner in which property shall be assessed for street improvements, the board of public works can not be compelled by mandate to make a new assessment for an amount the court thinks right, after such board, in compliance with the statute, has confirmed the assessment, and delivered the assessment roll to the department of finance. pp. 207-209.

SAME.—*Assessment for Street Improvements.—Collateral Attack.*—Where a person is summoned before a tribunal to challenge an assessment against his property for street improvements, he may not avoid the effect of non-attendance by averring in a subsequent proceeding that he was misled as to the tribunal's intended course of action. p. 209.

From Vanderburgh Circuit Court; J. H. Foster, Judge.

Application for mandamus by the State, on relation of Louis Koester, against Michael Gorman and others, constituting the board of public works of the city of Evansville, and the city of Evansville. From a judgment for relator, defendants appeal. *Reversed.*

D. C. Givens, A. Gilchrist and C. A. DeBruler, for appellants.

J. T. Walker, for appellee.

BAKER, J.—Mandamus. Relator's application and the alternative writ disclose that relator owned real estate fronting on Washington avenue in Evansville; that Gorman,

157	205
162	485

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Wiltshire and Rietman constituted the board of public works of the city; that the board duly adopted a resolution to improve Washington avenue; that such proceedings were had that a contract was duly let, and the work was fully performed; that the tracks of the Evansville Street Railroad Company extended along Washington avenue; that by the terms of the contract between the city and the company (which is set out in full) the company was liable to pay for so much of the improvement as was within the limits of the tracks; that the board made an assessment against relator and all other abutters for his and their proportionate part of the cost of the improvement without deducting from the cost the amount the street railroad company should have been made to pay; that relator demanded of the board that a new assessment be made, etc. The relief sought was a peremptory mandate directing the board of public works to make an assessment against relator's property for the amount of the existing assessment less a stated sum which ought to have been paid by the street railroad company. Demurrers overruled. Appellants answered that they were advised that under the contract between the street railroad company and the city no part of the cost of the improvement could be charged against the company; that they therefore made out the assessment roll to cover the total cost of the improvement; that they duly published notice of the time when and place where property owners would be heard on their objections to their assessments; that the assessment roll remained on file for examination by property owners; that at the time set for the hearing no objection was made by relator or any property owner to the amount of his assessment as it appeared on the roll; that the board thereupon confirmed the assessments as made and delivered the roll to the department of finance for collection. Demurrer overruled. Relator replied that he had not attended the hearing because the city engineer had told him some days before the hearing was to be had that the street

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railroad company would have to pay for the part of the improvement between the rails, and because certain property owners informed him that the board had informed them some days before the hearing that the street railroad company would have to pay. Demurrers overruled. Trial and judgment for the issuance of a peremptory writ commanding the board to make an assessment for a sum stated in the judgment. Motion for a new trial overruled. Errors are assigned on all adverse rulings.

“Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station.” §1182 Burns 1894, §1168 R. S. 1881 and Horner 1897.

The duties of the board of public works of Evansville with respect to making assessments for street improvements are prescribed by the act of 1893 as amended in 1895. §§73-82 Acts 1893, p. 65, *et seq.*; §§3977-3986 Burns 1894; §§18-21 Acts 1895, p. 258 *et seq.*; §§3977, 3978, 3981, 3985 Burns Supp. 1897. In all respects that are material to this case, these statutory provisions are the same as those of the “Barrett law”, considered in *Adams v. City of Shelbyville*, 154 Ind. 467, 49 L. R. A. 797. The board adopts and publishes a “resolution of necessity”. If the board finally orders the improvement to be made, they advertise for bids and let the contract. When the work is completed, the city engineer is required to certify that fact to the board, together with his final estimate of the cost. It thereupon becomes the duty of the board to prepare an assessment list, assessing each parcel of abutting real estate for its proportion of the cost according to frontage. “Whenever such assessment list is completed,” the statute proceeds, “said board shall fix a time and place when and where objections to such assessment will be heard, and shall cause notice thereof to be given by publication in a newspaper of general circulation published and printed in such city once each week for two successive

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weeks. Such notice shall name a day not earlier than ten days after the last publication, on which said board will receive and hear remonstrances from persons with regard to their respective assessments. On the day named in such notice said board shall proceed to hear and determine such remonstrances and may change, modify or confirm the same.

\* \* \*. After hearing such remonstrances said department shall deliver such assessment roll as modified or confirmed to the department of finance." §20 Acts 1895, p. 258; §3981 Burns Supp. 1897.

Under the holding of the majority of the court in *Adams v. City of Shelbyville, supra*, the assessment list as made out and filed by the board, assessing each parcel of abutting real estate for its proportion of the cost according to frontage, was merely a *prima facie* charge of the amount the owner should pay; the board was a proper tribunal for hearing and determining the question as to the proper amount; the notice and hearing were sufficient to constitute "due process of law"; and the owner, after having had his "day in court", can not inquire into the correctness of the assessment collaterally.

In this case the board were advised by the city attorney that under the street railroad company's contract with the city no part of the cost could be charged against the company. Counsel for relator construe the contract otherwise. But it is unnecessary to examine the contract, because the failure to deduct for the space occupied by the tracks simply resulted in making relator's assessment larger than he claims it ought to have been, just as would be the case if the total cost, by mistaking the width or length or price per square yard of the improvement, was figured to be more than it actually was. It was the duty of the board, on the day set for the hearing, to proceed and complete the assessment with the best light they had. And though it may be proper and commendable for the board to correct their own errors (if the proceedings have not passed beyond their control), there is no statute, nor duty resulting from their office, which

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warrants the issuance of a mandate to compel the board to make a new assessment for the amount the court thinks right, after they have given notice, concluded the hearing, confirmed the assessment, and delivered the assessment roll to the department of finance.

Because the application and alternative writ do not deny, they have been taken as admitting that the board in making the assessment complied with all the statutory requirements as to notice and hearing. The cases cited by relator, *Hamilton v. State, ex rel.*, 3 Ind. 452; *City of Indianapolis v. Patterson*, 33 Ind. 157; *Indianapolis, etc., R. Co. v. State, ex rel.*, 37 Ind. 489; *Pudney v. Burkhart*, 62 Ind. 179, and *Wren v. City of Indianapolis*, 96 Ind. 206, are not applicable, for in each the performance of the act sought to be enforced was found to be "specially enjoined by law".

Since the matter set up in the replies might be brought into an amended application, it may be well to observe that, when a person is summoned before a tribunal to challenge a charge against his property, he may not avoid the effect of non-attendance by averring in a different proceeding that he was misled as to the tribunal's intended course of action; and this is especially true if he relies upon hearsay and rumor.

Judgment reversed, with directions to sustain the demurrers to the application and alternative writ.

## BEALL, JR., v. UNION TRACTION COMPANY.

[No. 19,490. Filed June 27, 1901.]

**APPEAL AND ERROR.—Bill of Exceptions.—Evidence.—Record.—**In order to make the bill of exceptions containing the evidence a part of the record under the act of 1897 (Acts 1897, p. 244), it must affirmatively appear that it was filed with the clerk after being settled and signed by the judge. p. 210.

**SAME.—Directing Verdict.—Evidence.—Record.—**The action of the court in directing a verdict for defendant will be presumed to be correct on appeal, in the absence of the evidence from the record. pp. 210, 211.

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From Wayne Circuit Court; *H. C. Fox*, Judge.

Action by Curran Beall, Jr., against the Union Traction Company. From a judgment in favor of defendant, plaintiff appeals. *Affirmed.*

*E. F. Daily*, *J. W. Lovett*, and *F. E. Holloway*, for appellant.

*W. A. Kittinger* and *J. A. Van Osdol*, for appellee.

HADLEY, J.—Appellant sued appellee to recover damages for injuries alleged to have been received through the latter's negligence. Demand \$15,000. The action was commenced in Madison county, but by regular changes of venue reached and was tried in the Wayne Circuit Court. The case went to the jury on the general issue, and at the close of the plaintiff's evidence, the court, on motion of the defendant, directed the jury to return a verdict for the defendant, which it accordingly did. This action of the court is the only error sought to be presented.

The evidence is not in the record. Appellant states in his brief that it is "under the act of March 3, 1899" (Acts 1899, p. 384). But §6 of this act, since the filing of appellant's brief, has been held invalid. *Adams v. State*, 156 Ind. 596.

The law of 1897 (Acts 1897, p. 244) must therefore be complied with in bringing exceptions into the record. It is disclosed that a longhand copy of the evidence was certified and filed by the reporter in the clerk's office June 23, 1900, and that the same was presented to the trial judge and signed by him June 29, 1900. The signing by the judge was within the time allowed for the filing of the bill, but it nowhere appears that it was filed *after* being settled and signed by the judge. The subsequent filing was absolutely essential to its becoming a part of the record, and the fact of filing must affirmatively appear. Acts 1897, *supra*; *Loy v. Loy*, 90 Ind. 404; *Shulse v. McWilliams*, 104 Ind. 512; *Jenkins v. Wilson*, 140 Ind. 544; *Hoover v. Weesner*, 147 Ind. 510.

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We must presume in favor of the right action of the court, and the evidence not being before us, we may presume a total absence of evidence in support of the complaint.

Judgment affirmed.

## WILLIAMS v. HERT ET AL.

[No. 19,640. Filed June 27, 1901.]

**HABEAS CORPUS.**—*Refusal of Trial by Jury.*—*Criminal Law.*—Where defendant was tried and convicted for petit larceny, a writ of *habeas corpus* for his release, on the ground that he was refused a trial by jury, was properly denied, as the action of the court in refusing defendant a trial by jury, if erroneous, did not deprive the court of jurisdiction of the offense charged, nor of the person of defendant, and can only be reviewed and corrected on appeal.

From Clark Circuit Court; *J. K. Marsh*, Judge.

*Habeas corpus* by Frank E. Williams for his discharge from prison. Appeal from order quashing the writ. *Affirmed.*

*L. A. Douglass* and *H. W. Phipps*, for appellant.

*W. L. Taylor*, *C. C. Hadley*, *Merrill Moores* and *F. M. Mayfield*, for State.

**MONKS, C. J.**—This is a proceeding by writ of *habeas corpus* against the superintendent and assistant superintendent of the Indiana Reformatory for the discharge of appellant from said institution. On motion of appellees the writ of *habeas corpus* was quashed. It is alleged in the application for the writ that appellant was charged in the Madison Circuit Court by affidavit and information with the crime of petit larceny; that he entered a plea of not guilty to said charge, and demanded that said cause be tried by a jury, which demand was refused; that he was tried by the court, found guilty of the offense charged, and it was found that he was twenty-five years of age. Judgment was rendered on the

157	211
163	467

157	211
164	461

157	211
165	70

157	211
167	123

157	211
169	102
169	666

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finding. Appellant insists that all the proceedings in said cause, after his demand for a jury trial, were without jurisdiction, and the same were and are absolutely void.

If the Madison Circuit Court refused appellant a trial by jury, such action of the court, even if erroneous, did not deprive said court of jurisdiction of the offense charged, nor of the person of appellant. Such error can only be reviewed and corrected on appeal. *Koepke v. Hill, ante*, 172. *Winslow v. Green*, 155 Ind. 368, 369, and cases cited. As was said in the case last cited "The law is firmly established, that jurisdiction being once obtained over the person and subject matter, no error or irregularity in its exercise will make the judgment void."

This proceeding is a collateral attack on said judgment of the Madison Circuit Court committing appellant to the Indiana Reformatory, and can not succeed unless said judgment is absolutely void. *Crawford v. Lawrence*, 154 Ind. 288; *Winslow v. Green*, 155 Ind. 368, and cases cited; *Lee v. McClelland, ante*, 84; *Koepke v. Hill, ante*, 172.

This proceeding can not therefore be used for the correction of errors and irregularities in said criminal case under which appellant was committed to the Indiana Reformatory. *Willis v. Bayles*, 105 Ind. 363; *Lee v. McClelland, supra*.

As the Madison Circuit Court had full and complete jurisdiction of the criminal case against appellant and of his person, the judgment was not void.

It is proper to say that appellant appealed from the judgment of the Madison Circuit Court committing him to the Indiana Reformatory to this court, and sought a reversal of that cause upon the same ground alleged in his application for a writ of *habeas corpus* in this proceeding, and that said judgment was affirmed. *Williams v. State, ante*, 94. Judgment affirmed.



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**EUREKA LUMBER COMPANY ET AL. v. BUFF & BLUE  
OOLITIC STONE COMPANY ET AL.**

[No. 19,458. Filed June 28, 1901.]

**APPEAL AND ERROR.—Record.—Receivers.**—No question is presented in an appeal from an interlocutory order refusing to appoint a receiver, where the affidavits and evidence offered on the hearing of the application are not made a part of the record by bill of exceptions.

From Morgan Circuit Court; *G. W. Grubbs*, Judge.

Action by Eureka Lumber Company and others against Buff & Blue Oolitic Stone Company. From an interlocutory order refusing to appoint a receiver for the stone company, plaintiffs appeal. *Affirmed.*

*G. W. Kretzinger, E. C. Field, J. E. Henley and J. B. Wilson*, for appellants.

*F. Winter and F. J. L. Meyer*, for appellees.

**BAKER, J.**—Appeal from an interlocutory order refusing to appoint a receiver for the appellee stone company. The affidavits and evidence offered on the hearing of the application have not been made a part of the record by a bill of exceptions. No question, therefore, is presented.

Judgment affirmed.

157	213
160	687
157	213
161	290
161	354
157	213
164	276
164	277

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**BRAXTON v. THE STATE.**

[No. 19,568. Filed October 1, 1901.]

**CRIMINAL LAW.—Instructions.—Harmless Error.**—The action of the court in giving and refusing to give certain instructions concerning the law applicable to assault and battery with intent to commit murder in the first and second degrees cannot be questioned by defendant on appeal, where he was acquitted of the intent to commit murder either in the first or second degree and was found guilty of assault and battery with intent to commit manslaughter. *pp. 214, 215.*

**SAME.—Instructions.—Assuming Facts to be Proved.**—Where, in the trial of an action for assault and battery with intent to commit

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murder, the evidence showed without conflict that defendant first attacked and knocked the prosecuting witness down, rendering him unconscious by the blow, and that while he was lying on the ground in that condition defendant kicked him on the face and head, an instruction assuming the truth of the facts thus established will not work a reversal of the cause on appeal. *p. 215.*

**CRIMINAL LAW.—Instructions.—Assuming Facts to be Proved.—Self-Defense.**—Where, in a prosecution for assault and battery with intent to kill, the evidence showed conclusively that defendant first attacked the prosecuting witness, and there was no evidence that the prosecuting witness was making or attempting to make any assault upon defendant, an instruction assuming the truth of such facts was not erroneous as taking from the jury defendant's right of self-defense. *p. 215.*

**SAME.—Evidence.**—The jury are the exclusive judges of the facts proved, and of all inferences to be drawn therefrom in the trial of a criminal cause, and their finding will not be disturbed on appeal where there is some evidence to sustain it. *p. 216.*

From Floyd Circuit Court; *W. C. Utz*, Judge.

Emmet Braxton was convicted of assault and battery with intent to commit manslaughter, and appeals. *Affirmed.*

*C. D. Kelso*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores*, *C. C. Hadley* and *G. B. McIntyre*, for State.

**MONKS, C. J.**—Appellant was charged by indictment with the crime of assault and battery with intent to commit murder in the first degree. The trial resulted in a verdict of guilty of assault and battery with intent to commit manslaughter. Over a motion for a new trial judgment was rendered on the verdict. The errors assigned call in question the action of the court in overruling the motion for a new trial. The causes assigned for a new trial and not waived by a failure to argue the same are: “(1) The court erred in giving each of instructions nine and sixteen; (2) the court erred in refusing to give each of instructions two and three requested by appellant; (3) the verdict is contrary to the evidence.”

Instruction nine given by the court and instructions two and three requested by appellant were concerning the law

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applicable to assault and battery with the intent to commit murder in the first and second degrees. As appellant was acquitted of the intent to commit murder either in the first or second degree, and found guilty of assault and battery with the intent to commit manslaughter, the errors, if any, in giving said instruction, or in refusing to give each of said instructions requested, were harmless. *Shields v. State*, 149 Ind. 395; *Rains v. State*, 152 Ind. 69, and cases cited.

The first objection urged to instruction sixteen given by the court is that it assumes that "appellant assaulted the prosecuting witness, Applegate, and therefore invades the province of the jury." The evidence given in the cause was clear and conclusive and without conflict that appellant first attacked and knocked the prosecuting witness down, that he was rendered unconscious by the blow, and that while he was lying on the ground in that condition appellant kicked him twice on the face and head. When facts are thus established without conflicting or opposing testimony, an instruction assuming the existence or truth thereof will not work a reversal of the cause, because the error, if any, is harmless. *Thompson on Charging the jury*, 74; *Carver v. Carver*, 97 Ind. 497, 518, 519, and cases cited; *Koerner v. State*, 98 Ind. 7, 13; *Smith v. State*, 28 Ind. 321, 327.

Appellant's next objection to said instruction is that it "took away from the jury the consideration of appellant's right of self-defense." There was no evidence that the prosecuting witness was making or attempting to make any assault upon appellant at or immediately before the assault and battery charged in the indictment, nor was there any evidence that the manner and actions of the prosecuting witness were such as to cause appellant to believe and that he did believe that he was in danger of losing his life or of suffering great bodily harm at the hands of the prosecuting witness unless he committed the acts charged. Appellant was not entitled therefore to have the law of self-defense given to the jury.

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Pittsburgh, etc., R. Co. v. Martin.

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It is next insisted that "the jury were not justified in coming to the conclusion that appellant intended to kill the prosecuting witness." In criminal cases the jury are the exclusive judges of the facts proved and of all inferences to be drawn therefrom. *Burrows v. State*, 137 Ind. 474, 477, and cases cited, 45 Am. St. 210. After a careful examination of the evidence we cannot say that there was no evidence of such intent, and therefore cannot disturb the finding of the jury upon that issue. *American Varnish Co. v. Reed*, 154 Ind. 88; *Rownd v. State*, 152 Ind. 39. Judgment affirmed.

Dowling, J., did not participate in the decision of this cause.

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THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. MARTIN, ADMINISTRATRIX.

[No. 19,148. Filed October 8, 1901.]

**APPEAL AND ERROR.—Record.—Bill of Exceptions.—Motions.**—A motion to make the complaint more specific is not properly in the record where the motion was merely referred to in the bill of exceptions by reference to the page in the transcript where it had been copied by the clerk, without order of court, and no order of court was made that the motion should be made a part of the record without a bill of exceptions. *p. 218.*

**NEGLIGENCE.—Pleading.—Contributory Negligence.**—A complaint in an action against a railroad company for the death of plaintiff's intestate is not bad as failing to show decedent's freedom from fault, where it is shown that decedent was in a place where he had a right to be, was in the line of his employment, and was killed while there in a collision with respect to which defendant was negligent, there being a general allegation of freedom from contributory negligence, it not being disclosed what decedent did, or what, having the opportunity, he failed to do. *p. 219.*

**SAME.—Contributory Negligence.—Evidence.—Railroads.**—Decedent, as a locomotive engineer, was engaged in operating a switch engine over tracks used by several companies. No printed rules of any of the companies applied to the operation of trains upon the common tracks, but it was established by usage that all trains had equal rights; all south bound ran on the east track, all north bound on the west; each engine or train was to be run under full control, and

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with a sharp lookout to avoid running into any engine or train ahead of it. An ordinance forbade the running of engines at a higher speed than four miles an hour. While engaged in switching a car to a side-track, defendant's passenger train was seen approaching from the north at a distance of about 750 feet, whereupon decedent blew the whistle as a warning for defendant's train to stop, and said to the fireman "they will stop." Decedent had stopped his engine and thrown the lever to proceed south when defendant's engine, under a headway of thirty miles an hour, ran into decedent's engine, killing decedent. *Held*, that decedent was free from contributory negligence. pp. 219-224.

**TRIAL.—Admission of Evidence.—Exception.**—An offer to prove must be made before the objection to the question has been sustained. p. 224.

**SAME.—Evidence.—Railroad Rules.**—In the trial of an action for damages caused by a collision, no error was committed in refusing to permit defendant railroad company to introduce in evidence a book of rules, in the absence of evidence from which the jury might have found that the offered rules were in force on the tracks where the collision occurred. pp. 224, 225.

**SAME.—Evidence.—Railroad Rules.**—A question propounded to a witness relative to the rules or custom governing the operation of trains on a certain railroad was not objectionable on the grounds that the printed rules were the best evidence, where it was not disclosed by the evidence that any printed rules were in use, and it was shown that the rules inquired about were rules that had become established by usage. p. 225.

**APPEAL AND ERROR.—Waiver of Error.**—Assignments of error not discussed on appeal are waived. p. 226.

**TRIAL.—Evidence.—Harmless Error.**—Available error cannot be predicated upon the action of the court in overruling an objection to the question, "State whether or not he was acting properly or improperly, or promptly or not promptly," the question relating to the manner in which an engineer obeyed signals, where the witness answered, "Yes, sir." p. 226.

**RAILROADS.—Negligence.—Violation of City Ordinance.—Master and Servant.**—In the trial of an action for damages for the death of an engineer caused by collision with a train which was being run at a rate of speed in violation of a city ordinance, an instruction that the ordinance was enacted for the protection of the general public in crossing or passing upon railroad tracks, and not for the benefit of railroad employes while engaged in their work, was properly refused. pp. 226, 227.

**SAME.—Negligence.—Notice.—Instructions.**—In the trial of an action against a railroad company for damages for the death of an engineer

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of another road, caused by a collision with a train which was being run in violation of an ordinance and the usages of the tracks, an instruction that decedent was bound to use reasonable diligence for the purpose of learning whether or not defendant's trains generally ran, or were scheduled to run, over the common tracks in violation of the ordinance and usages of the tracks, and that, if by reasonable diligence he could have learned of such violation, he went upon the tracks at his peril, was properly refused. *p. 227.*

From Marion Superior Court; *J. L. McMasters*, Judge.

Action by Lettie Martin, administratrix, against the Pittsburgh, etc., R. Co., for the death of her husband. From a judgment for plaintiff, defendant appeals. *Affirmed.*

*S. O. Pickens*, for appellant.

*J. B. Kealing* and *M. M. Hugg*, for appellee.

BAKER, J.—Appellee recovered a judgment against appellant for \$7,250 for wrongfully causing the death of her intestate. Appellant assigns that the court erred in overruling its motion to require each paragraph of complaint to be made more specific, its demurrers to the first and second paragraphs of complaint, and its motion for a new trial.

The motion to make more specific is not in the record. The clerk has copied the motion into the transcript as a part of the proceedings of the day on which the motion was filed. After the motion was overruled, time was given in which to file a bill of exceptions. The bill, as copied by the clerk, does not contain the motion, but refers to the place in the transcript where it had been previously copied. No order of court was made that the motion should be a part of the record without a bill of exceptions. The act of the clerk in copying the motion into the transcript, outside of the bill and without order of court, was unwarranted under §662 Burns 1901, §650 R. S. 1881 and *Horner* 1897. Only those matters that are already properly in the transcript as a part of the record may be brought into the transcript of a bill of exceptions by reference. *Gussman v. Gussman*, 140 Ind. 433.

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In support of the demurrers, appellant contends that appellee's averments do not affirmatively show that the decedent was free from fault. In the first paragraph the accident is described substantially as follows: That, from Washington street to Massachusetts avenue, in Indianapolis, Indiana, appellant, the Big Four, the Lake Erie and Western, and the Monon companies used a line of railway tracks in common; that on August 7, 1897, and long prior thereto, decedent was employed by the Monon company as a locomotive engineer; that on that day decedent, in performance of his duties to his employer, had his engine upon the common tracks, and thereupon appellant wrongfully, carelessly and negligently ran one of its engines against decedent's engine and killed him without any fault on his part. The second paragraph comprised substantially the same and the following additional averments: That it was the rule and custom of all the companies, as appellant knew, that engines and cars should be run over the common tracks at a reasonable speed and under full control of the engineers so that a stop could be made at any time within a very short distance; that appellant violated the rule, and ran an engine at an unreasonable and dangerous speed, without its being under full control of the engineer, wrongfully and negligently against decedent's engine and killed him without any fault on his part. Each paragraph contains the general averment that decedent was free from contributory negligence. This is sufficient unless specific averments prove the general allegation to be false. It appears that decedent was in a place where he had a right to be, was in the line of his employment, and was killed, while there, in a collision with respect to which appellant was negligent. What decedent did, or what, having the opportunity, he failed to do, is not specifically alleged. The demurrers were therefore properly overruled. *Stewart v. Pennsylvania Co.*, 130 Ind. 242; *Citizens St. R. Co. v. Sutton*, 148 Ind. 169.

Appellant contends that the evidence fails to establish de-

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cedent's freedom from contributory negligence. The evidence is conflicting at some points, but the jury were warranted in taking the facts to be these: Extending southerly from Massachusetts avenue to Washington street were two main tracks, used in common by appellant, the Big Four, the Lake Erie and Western, and the Monon companies. One track was owned by the Big Four and the other by the Lake Erie and Western. All south-bound engines and trains used the east track; north-bound, the west track. Near Massachusetts avenue was a switch, through which south-bound trains had to pass in order to enter upon this common track. Near Washington street was a switch, through which south-bound trains had to pass from this common track in order to enter upon the tracks of the Union railway company, a corporation that owned the Union station and a belt line connecting together all the railroads of Indianapolis. Near this last named switch was another, leading to the Monon freight yard. The Massachusetts avenue switch was in charge of a switch-tender employed by the Big Four. The Washington street switch was in charge of a switch-tender employed by the Union company. The distance between these switches was a little over a mile. No switch intervened. About 600 feet north of Washington street and parallel therewith was Market street, from which the common tracks curved somewhat to the east. The four companies heretofore named used the common tracks for their passenger and freight trains. More than thirty passenger trains passed daily over these tracks. The switch engines of all companies in the city used these tracks in the handling and interchange of freight cars. The trainmen were not permitted to throw the switches, but the tenders in charge governed the admission or exclusion of trains and engines. No printed rules of any of the companies, or of the companies jointly, applied to the operation of trains and engines upon the common tracks; but, by usage, the following rules had become established: While on these tracks



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all engines and trains had equal rights; all south-bound ran on the east track, all north-bound on the west; each engine or train was to be run under full control and with a sharp lookout so as to avoid running into any engine or train ahead of it; no flagging or other warning to the rear was required or used; as no north-bound engines were admitted on the east track, and *vice versa*, the safety of all was to be maintained by each avoiding injury to those ahead; if an incoming passenger train from the north was ten or more minutes late, switch-engines with cars were admitted on the east or south-bound track; if a switch engine, moving south, had a car or cars in front destined for the Monon yard, the crew had the right to put the car in the yard, move northward sufficiently to clear the switch, and continue south; and if a passenger train followed, it was to be under full control, and its crew were to look out for the switch engine and cars ahead of it, to come to a full stop if necessary, and to whistle as a signal that they wanted the track, and thereupon the switching crew were to get off of the common track and out of the way as soon as practicable. An ordinance forbade the running of engines and trains anywhere in the city at a higher speed than four miles an hour. About 3 o'clock in the morning of August 7, 1897, a Monon switching crew came from the north to the Massachusetts avenue switch leading to the south-bound common track. The crew comprised the conductor, two brakemen, the fireman, and decedent as the engineer. The conductor had charge of his train and authority to direct the other members of the crew. Appellant's south-bound passenger train, according to schedule, was due in two or three minutes; but it was fifteen minutes late and was so reported. The switch-tender gave the track to the Monon conductor. The engine was at the north or rear end of a train of twenty freight cars, the southernmost one of which was destined to the Monon yard. The conductor was on this car, one brakeman was at the center of the train, the other brakeman was on the car next to the

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engine, and the fireman and decedent were in the cab of the engine. Near Washington street the conductor gave the switch-tender a signal to open the switch leading into the Monon yard. The conductor cut off the car and when it had passed over the switch gave the signal to stop the engine. The car passed into the yard of its momentum. The south end of the remaining cars was over the switch about forty feet. The conductor gave the signal to go north. After going far enough to clear the switch, he signaled to stop and then proceed south. Just after this last signal was given, the fireman saw the reflection of the headlight of appellant's train which was then over 750 feet away. The train itself was not in sight on account of the curve in the track. The fireman notified decedent, who immediately whistled as a warning for appellant's train to stop, and said to the fireman "they will stop". The train was then about 400 feet away. Decedent had stopped his engine and thrown the lever to proceed south, when appellant's engine, under a headway of thirty miles an hour, ran into decedent's engine. The fireman, in the act of jumping, was thrown by the collision; but the engineer was caught and killed. The collision occurred about a mile from Massachusetts avenue, about twenty-four minutes after the switch engine, and about three minutes after appellant's train had left that avenue. Appellant's train, if under full control of its engineer, or if proceeding at the speed limited by ordinance, could have been stopped within seventy-five feet. The conductor of the switching crew could have got his train out of the way of appellant's passenger train in one minute by proceeding south as he was doing. It would have taken him five or six minutes to have put his train in the Monon yard, because the tracks were so occupied that he would have had to cut his train into sections and run it in on three different tracks in the yard.

Decedent was not negligent in entering upon the common track. The conductor had charge of the movements of the

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train. The switch-tender, in accordance with established usage, opened the way. There was no present imminent danger to make it negligent for decedent to obey the directions of his conductor. The Monon crew proceeded south on the common track in a proper manner. The Monon had as much right to the track as appellant; but the duties of the train crews were not reciprocal, for it was the duty of appellant's servants to follow, under control, prepared to avoid overtaking and running into the Monon train. At the yard-switch decedent acted upon the orders of his conductor. He would have been without fault if his whole attention had been taken up with watching for the conductor's signals at the time and in handling his engine. But, at the first indication of danger, the fireman told decedent of it, and he gave appellant's servants a signal to stop. He believed they would act upon it, for he said to the fireman "they will stop". When it became apparent that they would not, it was too late for decedent to escape. The business of running a switch engine over the complicated tracks of a large city, where scores of trains and engines are moving almost constantly, is extremely hazardous, but necessary and lawful. To require such an engineer to anticipate and provide against the possible or probable negligence of trainmen of other companies would be to deprive him of remedy for his injuries or to drive him from his occupation. He has the right to go about his business, obeying the ordinances and rules established for the safety of all, on the assumption that others will do likewise; and it is only when, on the particular occasion, he learns, or by the exercise of reasonable diligence under the circumstances might have learned, of the negligent conduct of others, then threatening, that he is required to exercise reasonable care to avoid injury. *New York, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 116 Ind. 60; *Stringer v. Frost*, 116 Ind. 477, 2 L. R. A. 614, 9 Am. St. 875; *Shoner v. Pennsylvania Co.*, 130 Ind. 170; *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345; *Baltimore, etc.,*

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*R. Co. v. Peterson*, 156 Ind. 364. The cases cited by appellant that define the duty of travelers at highway crossings are manifestly inapplicable. Travelers can select their own time to cross the tracks. Decedent was proceeding rightfully along the track and could not have gotten off in time to avoid injury except by abandoning his post of duty before it became evident that appellant's servants would fail to stop. Nor is the case of *Evansville, etc., R. Co. v. Krapf*, 143 Ind. 647, in point. There, a collision occurred because two engineers, of different companies, each having the right to use a single track, came together from opposite directions, each failing to have his engine under such control as to stop when he came in sight of the other. Here, decedent was conforming to the city ordinance and rules of the track, and had his engine under full control. The collision, therefore, under the evidence which the jury had the right to accept, was chargeable solely to appellant's negligence.

Appellant asserts that the court erred in sustaining appellee's objections to certain questions propounded by appellant to its own witnesses in defense. The record shows that in each instance either no offer to prove was made or the offer came after the objection to the question had been sustained. No question is raised. *Gunder v. Tibbits*, 153 Ind. 591.

Appellant complains of the court's refusal to permit appellant to put in evidence certain printed rules of the Monon company. Counsel had a witness identify a Monon book of rules, and then asked if the rules therein were in force at the time of this accident; and the witness answered: "Principally. There may have been some changes. \* \* \*. You would have to go over the records and examine them to see. Some of them have been stricken out. There, for example, is one canceled there. Some have been changed by bulletin orders." Counsel had the "one canceled there" identified as number 171; but no evidence is pointed out that shows what part of the remaining rules was in force and

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what was stricken out or changed by bulletin orders. Those offered in evidence were not proved to have been in force when the accident occurred. Furthermore, no evidence is referred to by which it is shown that decedent ever had any knowledge of the offered rules. *Louisville, etc., R. Co. v. Berkey*, 136 Ind. 181. Again, counsel fail to cite any evidence in contradiction of appellee's which showed that the printed rules of the Monon did not apply to the operation of trains on the tracks of the Big Four and Lake Erie and Western from Massachusetts avenue to Washington street. In the absence of evidence from which the jury might have found that the offered rules were in force on the track where the collision occurred, the court properly excluded them as irrelevant. *Lake Erie, etc. R. Co. v. Mugg*, 132 Ind. 168.

Error is predicated on the court's permitting a witness for appellee to answer, over appellant's objection, certain questions as to the "rules", "rules or custom" and "general practice and custom" governing the operation of trains over the track where decedent was killed. The objection was that the rules were printed and were themselves the best evidence of their scope and meaning. The questions all occurred in the same connection. The first question in the context was whether there were any printed rules that applied to the common tracks, and the witness answered, without objection, that he (city yardmaster for the Monon at the time of the collision and for three years before that) had never seen nor heard of any, and that the Monon employes were not supplied with any. The "rules" inquired about were the rules that had become established by usage. The court, in ruling, remarked: "It is probably more a custom than a rule; if it is a well understood custom or rule of operation, I think he may answer." The objection made was not well taken.

The court overruled appellant's objection to the following question propounded by appellee to her witness Jay, who

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was fireman on decedent's engine: "State whether or not he [decedent] was acting properly or improperly, or promptly or not promptly?" The objection urged in argument here is that the question asks the witness to give an opinion on the very issue the jury were called to try. If the question were such, and if appellant had made a proper objection, and if a prejudicial answer had been allowed to stand, the error would be patent. The question, however, appears in this connection: "Q. Who would you give the signal to? A. To Mr. Martin [decedent]. Q. And then what did Mr. Martin do? A. Whichever way I told him to go, he turned his engine that way. Q. How was he working along there that night? A. The same as ever. Q. State whether he was acting promptly on the signals? Counsel for defendant objected to the question on the ground that it is incompetent to prove how the engineer was acting. Q. State whether or not he was acting properly or improperly, or promptly or not promptly? Counsel for defendant objected to the question on the grounds and for the reasons stated. The court overruled the objection, to which ruling the defendant by counsel at the time excepted. A. Yes sir." The context shows that the witness was asked to state the manner in which decedent was acting on the signals given by the conductor for the movement of the engine, and was not asked to give his opinion as to decedent's care or negligence under all the circumstances of the case. If the question was obnoxious to the objection made to the trial court, appellant has waived the error by failure to present and discuss it; and the objection urged here is unavailing because it was not presented to the trial court. *Indiana, etc., Co. v. Wagner*, 138 Ind. 658; *Stout v. Rayl*, 146 Ind. 379. In addition, the answer was harmless because the witness did not state whether decedent acted properly or improperly, or promptly or not promptly, in response to the signals.

The court refused to give certain instructions to the effect

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that the city ordinance was enacted for the protection of the general public in crossing or passing upon railroad tracks, and not for the benefit of railroad employes while engaged in their work. The action of the court was right. *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364.

Other instructions were refused which were based upon the theory that decedent was bound to use reasonable diligence for the purpose of learning whether or not appellant's trains generally ran, or were scheduled to run, over the common tracks in violation of the ordinance and the usages of the tracks, and that, if by reasonable diligence he could have learned of appellant's general practice to violate the ordinance and usages of the tracks, he went upon the tracks at his peril. A person may be bound by constructive knowledge of defects in the place where he works, but he certainly is not affected by constructive knowledge of the dangerous habits of third persons whom he meets on a common highway. What has been said in considering the evidence really disposes of this question. A holding to the contrary would seem to lead to the proposition that a multiplication of iniquities produces righteousness.

The last complaint is of the court's refusal to give appellant's instructions to the effect that decedent's duty to exercise reasonable care did not end with his own compliance with the ordinance and usages of the track, but that he was required to use diligence, under the circumstances, at all times preceding the collision, to avoid injury to himself. This subject was fully covered by instructions given.

Judgment affirmed.

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## BARNEY v. INDIANA RAILWAY COMPANY ET AL.

[No. 19,228. Filed October 8, 1901.]

CONTRACTS.—*Street Railroads.*—Plaintiff entered into a written contract with a street railroad company by the terms of which the railroad company was to extend its lines to plaintiff's driving park, plaintiff to pay for the steel rails, for which he was to be repaid from the receipts of the company, except \$500, which was to be donated by him, the railroad company to lay the track and operate it, and have it ready for operation at a certain date. No definite time during which the company should operate the road was fixed by the contract. The road was constructed and operated for four years in accordance with the terms of the contract, when the company ceased operation and removed the tracks. Plaintiff brought suit, alleging in one paragraph that it was the intention of the parties that the road should be operated permanently and perpetually, and in another paragraph that it was the intention that it should be operated a reasonable time, and that a reasonable time would be twenty-five years. *Held*, that construing the contract in the light of the position and surroundings of the parties, no breach thereof was shown by the complaint, since the contract cannot be enlarged, extended or contradicted by allegations concerning the intention or understanding of the parties.

From St. Joseph Circuit Court; *Lucius Hubbard*, Judge.

Action by Samuel E. Barney against the Indiana R. Co. and others on contract. From a judgment for defendants on demurrer to complaint, plaintiff appeals. *Affirmed.*

*J. M. Van Fleet* and *V. W. Van Fleet*, for appellant.

*W. L. Stonex*, *C. C. Black*, *C. W. Miller* and *J. S. Drake*, for appellees.

MONKS, C. J.—It appears from the record that appellant owned a tract of land near the city of Elkhart, Indiana, known as "Barney's driving park" which was fitted up and maintained by him as a driving and racing park at an expense of \$75,000; that on and prior to August 25, 1895, the Indiana Electric Railway Company owned and was operating a street railway in said city, and that the said driving



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park was about three-eighths of a mile distant from the said railway's track on Main street in said city; that in order to obtain an extension of said railway track north along Main street to said park appellant and said railway company entered into a contract in writing as follows: "This indenture made this 28th day of August, 1895, by and between Samuel E. Barney, party of the first part, and the Indiana Electric Railway Company, party of the second part, witnesseth: That the said Samuel E. Barney agrees to pay for and deliver to the said party of the second part sufficient steel rails to extend the track of the Indiana Electric Railway Company from Beardsley avenue to Barney's driving park northward on North Main street on the following terms and conditions, to wit: The said Barney donates \$500 of the cost price of said iron and he is to receive pay for the balance of the said iron as follows, to wit: The receipts of said Indiana Electric Railway Company are to be turned over to said Barney daily until said balance on said iron has been paid for. The Indiana Electric Railway Company reserves the right and option to pay the balance of the purchase price of said steel rails at any time before they have been paid for by the receipts of said company. Said Indiana Electric Railway Company is to place said rails, lay said track and operate it, and have it ready for operation as early as the 5th day of September, 1895; and it is further mutually agreed and understood that the title to all said rails shall be and remain in said Samuel E. Barney, and not pass from him to the said Indiana Electric Railway Company until the purchase price shall have been fully paid. Said Indiana Electric Railway Company shall negotiate the purchase of said rails and shall fix the price at which they are to be paid for by said Barney. In witness whereof the said Samuel E. Barney and the said Indiana Electric Railway Company by James Burns, its president, and Wilber F. Stonex, its secretary, have hereunto set their hands and seals the day and date first above written. (Seal.) Samuel E. Barney,

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Indiana Electric Railway Company, by J. J. Burns, President. Attest: Wilber Stonex, Secretary."

In accordance with said contract appellant paid for sufficient steel rails to make said extension and the same were delivered to said company, \$500 of the cost and value of said rails being donated by appellant. The company placed said rails and laid said track so as to extend said railway to said park, and began to operate the same on or about September 5, 1895, as provided in the contract, and continued to operate the same until it sold said road to the Indiana Railway Company. The last named company continued to operate said road and the part extending to said driving park until about the 25th day of July, 1899, when said company without the consent and over the protest of appellant took up the rails and ties of said railway track constructed under said contract and removed them and wholly abandoned and ceased to use that part of its railway.

The complaint is in two paragraphs, the first, in addition to the foregoing facts, alleges "that it was the intention and understanding of the parties in making said contract that said railway track should remain and be operated permanently and perpetually; that the Indiana Railway Company at the time it purchased said road had full notice and knowledge of said contract and the rights of appellant; that his damages are great and irreparable; that with said railway extending to said driving park the latter is worth \$75,000, and that the removal of said railway track caused a decrease of \$70,000 in the value of said driving park." The second paragraph is the same except it alleges "that it was the intention and understanding of the parties in making said contract that said railway track should remain and be operated a reasonable time; that a reasonable time would be twenty-five years." The prayer is for a mandatory injunction "to compel appellees to replace and operate said track; and if that relief cannot be had, for \$70,000 damages, and if this relief cannot be had, for

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\$1,000 damages, being the \$500 donated and interest." The court sustained a demurrer for want of facts to each paragraph, and appellant refusing to plead further final judgment was rendered against him.

The ground upon which appellant seeks a recovery is that after operating the road for about four years, the company ceased to operate it and removed the part of the track described in the contract. By the terms of the contract sued upon the company was to "place said rails, lay said track and operate it, and have it ready for operation as early as the 5th day of September, 1895". The allegations of the complaint show that this was done in conformity with the provisions of the contract, and that the company and its successor continued to operate the same until July 25, 1899. These allegations do not show any breach of said contract by appellees. Appellant advanced the money to purchase the iron, and made the donation of \$500 out of the money so advanced to have the track built and operated by a certain day. It was a gift executed when the company built and operated the road by the day named. The donation for the construction of the track cannot be held to constitute a consideration for operation for any definite period.

If the company was willing to operate the part of said road mentioned for any definite period, and appellant so desired, such a clause should have been incorporated in the contract. As the contract does not fix any definite time during which the company should operate the road, the right to determine that question, so far as appellant is concerned, remained with the company. It may be that appellant believed that if he secured the construction of the road to the park that the profits of the company on that part of the road would be such as to secure its perpetual operation. It is true that the contract sued upon may be read and construed in the light of the position and surroundings of the parties in regard to the subject of the contract (*Ransdel v. Moore*, 153 Ind. 393, and cases cited), but the same cannot

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be enlarged, extended, or contradicted by allegations concerning the intention or understanding of the parties. The intention of the parties must be determined from the contract read in the light of their situation and surroundings.

It will be observed that the rights and interests of the public are in no way involved in this action.

*Pierce v. Tennessee, etc., R. Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591, is the only case cited by appellant, but that case does not sustain his contention. Judgment affirmed.

Baker, J., did not participate in this decision.

## INDIANAPOLIS STREET RAILWAY COMPANY v. ROBINSON.

[No. 19,609. Filed October 8, 1901.]

**NEGLIGENCE.—Pleading.—Contributory Negligence.—Constitutional Law.**—The act of 1899 (Acts 1899, p. 58, §359a Burns 1901), providing that in all actions for damages arising from personal injury or death it shall not be necessary for plaintiff to allege or prove freedom from contributory negligence on the part of plaintiff, or on the part of the person for whose injury or death the action is brought, is not violative of §22, article 4 of the State Constitution, prohibiting the passage of local or special laws regulating the practice in courts of justice. *pp. 233-237.*

**SAME.—Pleading.—Contributory Negligence.—Constitutional Law.—Statutes.**—The act of 1899 (Acts 1899, p. 58, §359a Burns, 1901), providing that in all actions for damages arising from personal injury or death it shall not be necessary for plaintiff to allege or prove freedom from contributory negligence on the part of plaintiff, or on the part of the person for whose injury or death the action is brought, is not invalid because it expressly excludes all pending cases from its operation. *p. 237.*

From Morgan Circuit Court; *M. H. Parks*, Judge.

Action by Ardella C. Robinson against the Indianapolis Street Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. *Affirmed.*

*S. N. Chambers, S. O. Pickens, C. W. Moores, F. Winter* and *W. H. Latta*, for appellant.

*E. F. Ritter* and *W. S. Doan*, for appellee.

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DOWLING, J.—The appellee was at a station on the line of the railway of the appellant, and intended to take passage upon one of appellant's cars. While walking with a crowd of persons over a platform maintained by appellant at the station, a board in the floor gave way, and the appellee fell through the opening so made, and was severely injured. To a complaint stating these, with other facts, the appellant demurred. The demurrer was overruled. An answer in denial was filed, the case was tried by a jury, and a verdict was returned for the appellee. A motion in arrest of judgment was overruled. The sufficiency of the complaint is called in question by assignments of error upon these rulings. The points presented on this appeal are whether the complaint should have alleged that the accident occurred without contributory negligence on the part of the appellee, and, if so, whether such contributory fault is sufficiently negatived.

The appellant relies upon the propositions (1) that it was necessary to aver that the plaintiff was free from negligence *proximately* contributing to the injuries complained of, and that the act of February 17, 1899 (Acts 1899, p. 58), §359a *Bums* 1901, dispensing with that allegation, is unconstitutional, because the statute undertakes to regulate the practice of courts of justice, and is not a general law; and (2), that the complaint omits this essential averment.

The act of February 17, 1899, is in these words: "That hereafter in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought. Contributory negligence, on the part of the plaintiff, or such other person, shall be a matter of defense, and such defense may be proved under the answer of general denial: *Provided*, That this act shall not affect pending litigation."

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At common law, in actions for negligent injuries, it was never necessary to aver that the plaintiff was without fault. 2 Chitty on Pl., 708-712; *Hackford v. New York, etc., R. Co.*, 6 Lans. (N. Y.), 381, 43 How. Pr. (N. Y.), 222, 247.

It is said in 5 Ency. Pl. & Pr. 1, that "The authorities are well-nigh unanimous that, in an action for negligence, the plaintiff need not allege that the injury of which he complains was occasioned without his fault, or that he was not guilty of contributory negligence, as the rule is that 'it is not necessary to allege matters which would come more properly from the other side,' and contributory negligence is considered a defense that the defendant must make."

Among the earliest cases in this court which have been understood to hold that the complaint must aver the absence of contributory negligence on the part of the plaintiff is *President, etc., v. Dusouchett*, 2 Ind. 586, 54 Am. Dec. 467, where it is said by Blackford, J., that "The declaration in a suit for such damage must show that there was no fault on the plaintiff's part." By a uniform course of decision it was settled in this State that such an averment, or its equivalent, was indispensable in such actions, unless the specific averments of the complaint showed that the plaintiff was free from fault. This rule of pleading and evidence applied equally to actions for injuries to the person, and to those brought for injuries to property. Such was the state of the law when the act of February 17, 1899, was passed. The object and effect of that statute were to change an established rule of pleading and evidence. In the class of actions named in the statute it relieved the plaintiff from averring and proving that he was free from contributory fault, and it made such contributory negligence, if it existed, a matter of defense. Was it competent for the legislature to do this?

The authority of the legislature over the subject of the statute in question is indisputable. It has the power to prescribe rules of pleading and evidence, and methods of proof. *State, ex rel., v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566; *State v. Beach*, 147 Ind. 74, 36 L. R. A. 179.

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The Constitution of the State expressly prohibits the passage of local or special laws regulating the practice in courts of justice, and it requires that in all the cases enumerated in §22, article 4, all laws shall be general, and of uniform operation throughout the State. Constitution, article 4, §§22, 23, §§118, 119 Burns 1901.

The mischief under the Constitution of 1816 was that there was a total lack of uniformity in the statutes regulating the practice in the different courts and counties of the State. In *Reed v. State*, 12 Ind. 641, p. 648, Hanna, J., thus describes the condition of things resulting from the vicious system of legislation under the old Constitution: "It is well known, that in many of the circuits of the State, the judge thereof was at a loss, in each county, as to the local laws and regulations upon the subject of the practice of the law in such county. He would often be stopped in the midst of his charge to the grand jury, when commenting upon some offense against the law, and the rules of evidence, etc., that should be observed in their investigations thereof, by a suggestion that, by some local law, the grand jury had not jurisdiction over that offense. In another county he would meet with statutes, local to that county, by which certain days were set apart for forming and perfecting the pleadings, and others for the trial of causes of a civil nature. It was to remedy these, and various evils of a kindred character, that the clause and sections under consideration were adopted."

Again, it is said by Frazer, J., in *Hingle v. State*, 24 Ind. 28, p. 34: "What is a special act? It is such as at common law the courts would not notice, unless it were pleaded and proved, like any other fact. This is suggested in argument on behalf of the appellant, and we think that the proposition is correct. The distinction between general and special statutes was well known to the common law, though sometimes a question of great nicety, and it is in accordance with a well established principle to assume, that the Constitu-



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tion in using the terms intended them to be understood in the sense which was at that time recognized by the courts."

In *State, ex rel., v. Parsons*, 40 N. J. L. 1, special laws are thus described: "Interdicted, local and special laws are all those that rest on a false or deficient classification; their vice is that they do not embrace all the class to which they are naturally related; they create preference, and establish inequalities; they apply to persons, things or places possessed of certain qualities or situations, and exclude from their effect other persons, things or places which are not dissimilar in these respects."

The act of February 17, 1899, includes within its scope all persons, natural and artificial, against whom actions for damages may be brought on account of alleged negligence causing personal injury, or the death of any person. It applies to all actions of this kind, in all the courts of the State. The only objections taken to it are that it is not made applicable to all actions for negligent injuries, and that pending cases are expressly excluded from its operation. The class of cases to which the act applies is that involving personal injury or death, only. The class to which it does not apply includes all actions of tort affecting property, real or personal. This classification is not an unnatural or improper one. It appears to be fairly made, and there seem to be good reasons for it. The situation, management, and treatment of property, real and personal, are in most instances well known and can be readily established. But the circumstances attending an injury to the person are often difficult of proof. Where the mind of the plaintiff is affected by the injury, or death immediately ensues, proof that the plaintiff was free from negligence is in many cases impossible. So that, under the former rule, there was here a real hardship, and one that has often been pointed out by the profession. 1 Thompson's Com. on Law of Negligence, §§395, 396, 397, 398. The same degree of inconvenience is seldom or never experienced in making



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proof of the plaintiff's case in actions for injuries to property. Therefore, there was some ground and, in our opinion, reasonable ground for the classification adopted by the legislature. *Gilson v. Board, etc.*, 128 Ind. 65, 11 L. R. A. 835; *Consumers, etc., Co. v. Harless*, 131 Ind. 446, 15 L. R. A. 505; *Pennsylvania Co. v. State*, 142 Ind. 428.

The suggestion that the act is special because it does not apply to causes already pending in court is of little weight. From the time of the adoption of the present State Constitution, it has been the legislative practice, in many cases, to exclude pending causes from the operation of new enactments conflicting with former laws. A general act has been in force since 1853, declaring that no suits, instituted under existing laws, shall be affected by the repeal thereof, but that such suits may be prosecuted as if such laws had not been repealed. §243 Burns 1901.

The exclusion of pending actions from the operation of the statute simply renders the act prospective as to all cases to which it may apply. Such provisions are generally just and reasonable, and do not render such acts unconstitutional on the ground that the law is not general and of uniform operation.

As the act of February 17, 1899, was in force when the present suit was brought, and as that act must be held constitutional, it was not necessary for the plaintiff to aver that she was free from contributory negligence. The demurrer to the complaint, and the motion in arrest of judgment, were properly overruled.

We find no error. Judgment affirmed.

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HINKLE v. THE STATE.

[No. 19,654. Filed October 4, 1901.]

**CRIMINAL LAW.**—*Indictment.*—*Seduction.*—An indictment for seduction stating all of the elements of the crime as defined in the statute is sufficient. p. 239.

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**SEDUCTION.—*Promise of Marriage by Married Man.***—In a prosecution under §2078 Burns 1901 for seduction, an instruction that if the prosecuting witness, at the time of defendant's alleged promise to marry her under which she was seduced, knew that defendant was a married man and living with his family, the jury should acquit, was proper, where there was evidence to which the instruction was applicable. *p. 239.*

**TRIAL. — *Impeachment. — Criminal Law. — Seduction.*** — Where in a prosecution for seduction defendant's wife testified that some days prior to the date of the alleged seduction she met the prosecuting witness on the street with her husband and told her that the man she was with was her husband, and that she wanted her to let him alone, and the State's attorneys asked her if she had not told a certain person that her husband had run away, leaving her without a cent, and if a certain neighbor had not brought her provisions to keep her from starving while her husband was away with prosecuting witness, the State was bound by her answers in the negative, and the matters inquired about being collateral, the witness could not be impeached thereon. *p. 239.*

**SEDUCTION.—*Corroborating Evidence.— Instruction.***— Under §1876 Burns 1901, that in prosecutions for seduction "the evidence of the female must be corroborated to the extent required as to the principal witness in cases of perjury," an instruction that if the jury believed beyond a reasonable doubt that defendant had carnal and illicit intercourse with the prosecuting witness, a female of good repute for chastity, less than twenty-one years old, under promise of marriage which she had good reason to rely on, they should find defendant guilty as charged, was reversible error, since the jury might have found that all the facts on which conviction was conditioned were proved beyond a reasonable doubt by the unsupported testimony of the prosecuting witness. *p. 240.*

From Marion Criminal Court; *Fremont Alford*, Judge.

Samuel Hinkle was convicted of seduction and appeals.  
*Reversed.*

*J. O. Spahr*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

**BAKER, J.**—Appellant was convicted of seduction. He assigns that the court erred in overruling his motions for a new trial and in arrest of judgment.

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The indictment stated all the elements of the crime as defined in the statute, §2078 Burns 1901, §1992 R. S. 1881 and Horner 1897. This was sufficient. *State v. Stogdel*, 13 Ind. 565; *Stinehouse v. State*, 47 Ind. 17; *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211; 19 Ency. Pl. & Pr. 415; Gillett's Crim. Law, §741.

The court refused to give an instruction, prepared by appellant, that if the prosecuting witness, at the time of appellant's alleged promise to marry her under which she was seduced, knew that appellant was a married man and living with his family, the jury should acquit. There was evidence to which the instruction was applicable; and the offered instruction correctly stated the law. *Callahan v. State*, 63 Ind. 198. If a maiden yields her chastity to one whom she knows to be married, it is apparent that she is not deceived by means of a promise of marriage. The court, however, covered this subject in its instructions. There is some confusion in phraseology, but we believe that the jury could not have failed to get a correct understanding of the law on this point.

Appellant's wife, as a witness in his behalf, testified that some days prior to the date of the alleged seduction she met her husband with the prosecuting witness on the street and told her that the man she was with was her husband and that she wanted her to let him alone. The jury evidently did not believe Mrs. Hinkle. On cross-examination the State's attorney asked her if she had not told Timothy Splann that her husband had run away and left her without a cent, and also if a neighbor, Mrs. Crossley, had not brought her provisions to keep her from starving while her husband was away with the prosecuting witness. The matters inquired about were purely collateral. The questions were permissible on cross-examination for the purpose of showing, if possible, a change in attitude of Mrs. Hinkle to appellant and thus affecting her credibility; but the State was bound by her answers in the negative. The court, however,

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on rebuttal permitted the State, over appellant's objection, to contradict Mrs. Hinkle on these collateral matters. A witness may not be so impeached. The statute points out the only way. *Stalcup v. State*, 146 Ind. 270. The error was very prejudicial, because it must be taken that the jury would have acquitted appellant if they had believed Mrs. Hinkle's testimony.

Appellant excepted to an instruction in which the court charged the jury that, if they believed beyond a reasonable doubt that appellant, on or about December 25, 1900, at Marion county, Indiana, had illicit carnal intercourse with the prosecuting witness, a female of good repute for chastity, less than twenty-one years old, under a promise of marriage which she had good reason to rely on, they should find the defendant guilty as charged. The statute provides that in prosecutions for seduction "the evidence of the female must be corroborated to the extent required as to the principal witness in cases of perjury". §1876 Burns 1901, §1807 R. S. 1881 and Horner 1897. Under the instruction given, the jury may have found that all the facts on which conviction was conditioned were proved beyond a reasonable doubt by the unsupported testimony of the prosecuting witness. A conviction on such evidence alone is illegal, and the instruction was therefore harmful.

Some other questions, relating to the sufficiency and admissibility of evidence, are presented; but as they are not likely to arise on another trial, it is unnecessary to consider them.

Judgment reversed, with directions to sustain the motion for a new trial.

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CLAY TOWNSHIP v. HEAD.

[No. 19,449. Filed October 8, 1901.]

**APPEAL AND ERROR.**—*Transcript.*—Where a transcript is not accompanied with a certificate, over the signature of the clerk and seal of the court that the same is true, as required by §661 Burns 1894, the cause will be dismissed.

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State v. Smith.

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From Hamilton Circuit Court; *J. F. Neal*, Judge.

Action by Manson Head against Clay township, Hamilton county, for damages for the killing and maiming of sheep. From a judgment for plaintiff, defendant appeals. *Appeal dismissed.*

*I. W. Christian, W. S. Christian and E. E. Cloe*, for appellant.

*C. N. Beamer, F. E. Gavin, T. P. Davis and J. L. Gavin*, for appellee.

PER CURIAM.—We have before us what purports to be a transcript of the record of certain proceedings in said cause. It is not accompanied with a certificate over the signature of the clerk and seal of the court that the same is true. We have no power to consider a record as presenting questions for decision unless it comes to us authenticated as required by §661 Burns 1894, §649 R. S. 1881 and Horner 1897. *Watson v. Finch*, 150 Ind. 183; *Fidelity, etc., Union v. Byrd*, 154 Ind. 47; *Carpenter v. Schaeffer*, 154 Ind. 694; *Board, etc., v. State, ex rel.*, 156 Ind. 550.

The appeal must, therefore, be dismissed.

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THE STATE v. SMITH.

[No. 19,625. Filed October 9, 1901.]

**WEAPONS.—Travelers.—Criminal Law.**—One going from his home by rail a distance of fifteen miles in an adjoining county to attend a political convention is not a traveler within the meaning of §2069 Burns 1901, entitling him to carry concealed weapons. To come within the exception of the statute the travel must be without the ordinary habits, business, or duties of the person, and at least such a distance from his home as takes him beyond the circle of his acquaintances, among strangers, with whose habits, conduct, and character he is not acquainted.

From Sullivan Circuit Court; *O. B. Harris*, Judge.

Appellee Herb Smith was tried on the charge of carrying concealed weapons and acquitted. Appeal by State. *Appeal sustained.*

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*W. L. Taylor*, Attorney-General, *Merrill Moores*, *C. C. Hadley*, *E. W. McIntosh* and *W. H. Bridwell*, for State.

MONKS, C. J.—Appellee was tried and acquitted of the offense of carrying concealed weapons. This appeal was taken under §8 of the act of 1901 (Acts 1901, p. 566), being §1337h Burns 1901, and requires this court to determine the proper construction of §2069 Burns 1901, §1985 R. S. 1881 and Horner 1897.

The question presented is whether or not appellant, who went from his home in Sullivan, Indiana, by rail, to Linton, in an adjoining county, a distance of fifteen miles, to attend a political meeting, having no other business, and returned from the meeting to his home, was a traveler within the meaning of §2069 (1985), *supra*. If he was a traveler his case must be affirmed; if he was not the appeal must be sustained.

The evil sought to be remedied by said section was the insecurity of life caused by the pernicious habit of carrying concealed weapons, and the consequent demoralization of society. The word "traveler" when used in a broad sense designates one who travels in any way, distance not being material. It is clear that the legislature did not use the word in this sense, for such signification would destroy the very purpose for which the section was enacted, by licensing rather than suppressing the practice of carrying concealed weapons. It is manifest, therefore, that the word was employed in a more limited sense and was intended to designate a person traveling at least such a distance as takes him among strangers, with whose habits, conduct, and character he is not acquainted, where unknown dangers may exist, from which there may be a necessity to protect himself by preparing for a defense against an attack.

It follows that to come within the exemption of said section the travel must be without the ordinary habits, business, or duties of the person and at least to such distance from his home as takes him beyond the circle of his general

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acquaintances, among strangers with whose habits, conduct, and character he is not acquainted. Bishop on Stat. Crimes §788a; Bouvier's Law Dictionary (Rawles rev. ed.), p. 1134; 5 Am. & Eng. Ency. of Law (2nd ed.) 743; *Gholson v. State*, 53 Ala. 519, 25 Am. Rep. 652, and cases cited; *McGuirk v. State*, 64 Miss. 209, 1 South. 103; *Hathcote v. State*, 55 Ark. 181, 183-185, 17 S. W. 721; *Davis v. State*, 45 Ark. 359. To the extent that *Burst v. State*, 89 Ind. 133 and *Lott v. State*, 122 Ind. 393, may be deemed to hold a contrary doctrine, they are disapproved.

It is therefore evident that appellant was not a traveler within the meaning of said section. Appeal sustained.

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Coddington et al. v. Canaday, Receiver.

[No. 18,721. Filed October 10, 1901.]

COURTS. — *Jurisdiction.* — *Corporations.* — *Insolvency.* — *Receivers.* —

Under §1866 Burns 1901 the circuit court has jurisdiction of an action by the receiver against the directors of an insolvent corporation for damages alleged to have been sustained by the corporation in consequence of the negligence of the directors. *pp. 251, 252.*

PLEADING. — *Jurisdiction of Court.* — An objection that a complaint, in an action by a receiver of an insolvent corporation against the directors for damages alleged to have been sustained by the corporation by reason of the negligence of the directors, fails to show any liability on the part of the directors which a receiver can enforce goes not to the jurisdiction of the court over the subject-matter of the action, but to the sufficiency of the facts stated. *p. 252.*

SAME. — *Demurrer.* — *Want of Legal Capacity to Sue.* — The want of legal capacity to sue, as a cause of demurrer under the statute, has reference to some legal disability of the plaintiff, not that the complaint upon its face fails to show a right of action in the plaintiff. *pp. 252, 253.*

RECEIVERS. — *Corporations.* — *Banks and Banking.* — A complaint in an action by the receiver of a bank against the directors for damages because of negligence in management showing that the bank was a bank of discount and deposit organized under the statutes of this State; that it became insolvent, and that the receiver was appointed by the court upon the application of the Auditor of State under §2988 Burns 1901, the order of court authorizing him to bring and prosecute in his own name as such receiver all actions necessary in

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the discharge of his duties " whenever in the judgment of said receiver it would be proper to bring and prosecute any such proceedings or suits," that such receiver accepted the appointment, gave bond, and took the oath prescribed by law is sufficient to show the title and power of such receiver to maintain the suit. pp. 253, 254.

**PLEADING.—Defect of Parties.—Demurrer.**—The question of defect of parties defendant is not presented by demurrer to a complaint in an action by the receiver of a bank against the directors where it was not disclosed by the complaint that there was a director not joined. p. 254.

**SAME.—Parties.—Banks and Banking.—Receivers.—Actions ex Delicto.**—In an action by the receiver of a bank against the directors for breach of trust, it is not necessary that all of the directors be joined as defendants. p. 254.

**SAME.—Misjoinder of Causes of Action.—Banks and Banking.—Receivers.**—A complaint by the receiver of a bank against the directors for damages for breach of trust does not contain a misjoinder of causes of action where the damages claimed are alleged to arise from breaches of trust and official duty on the part of the defendants, and all of the specifications of negligence and misconduct belong to a single class. p. 255.

**SAME.—Misjoinder of Causes of Action.—Harmless Error.**—Error in overruling a demurrer for a misjoinder of causes of action is harmless. p. 255.

**RECEIVERS.—Banks and Banking.—Action Against Directors.**—An action may be maintained by the receiver of a bank against the directors for gross negligence resulting in waste and loss of the capital, although there are no debts and the shareholders are the only persons to whom the damages recovered could be distributed. pp. 255-257.

**PLEADING.—Motions.—Demurrer.**—The objection that the charge of negligence in a complaint is too general to require an answer is not raised by demurrer for want of facts. Such defect must be pointed out by motion to make more specific. p. 257.

**SAME.—Banks and Banking.—Action by Receiver.**—A complaint by the receiver of a bank against the directors for damages resulting from negligence in management is not bad for want of an averment that the receiver and the parties represented by him were without fault, since if such fact was available by way of defense it should have been set up by answer. p. 257.

**BANKS AND BANKING.—Liability of Directors for Losses Occurring Through Their Negligence.**—Under the statutes of this State (§2921 et seq. Burns 1901), the directors of a bank are the agents of the corporation, having the general custody, control, and management of its property and affairs, and, while not responsible for mere errors



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of judgment, they are responsible for losses and waste of money and property occurring through their gross inattention to the business of the bank or a wilful violation of duty. *pp. 257-260.*

PLEADING.—*Motions to Strike Out.*—Available error cannot be predicated upon the action of the court in overruling a motion to strike out parts of the complaint. *p. 260.*

SAME.—*Motion to Make More Specific.*—*Banks and Banking.*—*Receivers.*—A cause will not be reversed because of the action of the court in overruling a motion to make a complaint in an action by a receiver against the directors of a bank for damages resulting from negligent management more specific, where it appeared from the allegations of the complaint that plaintiff was unable to set out the facts more particularly for the reason that the books and records of the bank had been permitted by the defendants to be so imperfectly kept that the transactions complained of could not be more specifically described by the pleader. *p. 261.*

BANKS AND BANKING.—*Capital Stock.*—*Payment.*—An answer in an action by the receiver of an insolvent bank against the directors for damages resulting from mismanagement and accepting worthless notes, judgments, and real estate in payment of capital stock, alleging that the acceptance of such notes, judgments and real estate was expressly authorized by the stockholders, presents no defense as against the claims of creditors. *pp. 261-264.*

APPEAL AND ERROR.—*Motions.*—*Record.*—*Bill of Exceptions.*—Pleadings stricken out on motion, copied by the clerk but not brought into the record by bill of exceptions, are not a part of the record, and questions concerning the action of the court in striking them out cannot be considered on appeal. *p. 264.*

From Delaware Circuit Court; *G. H. Koons*, Judge.

Action by Jesse Canaday as receiver of the Citizens Bank of Union City against Benjamin F. Coddington and others as directors for damages resulting from alleged negligence in the management of the affairs of the bank. From a judgment for plaintiff, Coddington and Smith, appeal. Affirmed.

*S. R. Bell* and *J. B. Ross*, for appellants.

*J. W. Thompson, J. W. Ryan* and *W. A. Thompson*, for appellee.

DOWLING, J.—This action was brought by the appellee, in his own name, as the receiver of the Citizens Bank of

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Union City, Indiana, against the appellants, and others, who were the directors of that corporation. Its object was to recover damages alleged to have been sustained by the bank by reason of the negligence of the directors, and the gross mismanagement of the financial affairs of the corporation by them. The suit was commenced in the Randolph Circuit Court, the venue afterwards being changed to Delaware county. Motions were made by appellants to strike out parts of the complaint; to strike out the entire complaint; to separate it into paragraphs; to make it more certain; to strike out the 109th specification; and to make that specification more certain. Appellants Coddington and Smith each demurred to the complaint on the grounds that the court had not jurisdiction of the subject of the action, that the plaintiff had not the legal capacity to sue, that there was a defect of parties defendant, that there was a misjoinder of causes of action, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were overruled. The appellant Coddington filed an answer in a single paragraph, to which a demurrer was sustained. He then answered in three paragraphs, the *first* of which was a general denial. The *second* and *third* paragraphs of this answer were stricken out on motion of the appellee. The appellant Smith filed his separate answer in five paragraphs, to the *first*, *second*, and *third* of which demurrers were sustained. The *fourth* paragraph was stricken out on motion of appellee. The *fifth* was a general denial of the matters stated in the complaint. The cause was tried by a jury, who returned a general verdict in favor of the appellee, assessing his damages at \$50,000. With their verdict, the jury returned answers to nearly 1,000 questions of fact submitted to them by the parties. Motions for a new trial, and in arrest of judgment, filed by each appellant, were overruled, and judgment was rendered on the verdict. Coddington and Smith appeal, notice having been served upon their codefendants.

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Errors are assigned by appellant Coddington as follows: “(1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court had not jurisdiction of the subject of the action; (3) the court erred in overruling the motion to strike out parts of the complaint; (4) the court erred in overruling the motion to strike out the entire complaint; (5) the court erred in overruling the motion to paragraph the complaint; (6) the court erred in overruling the motion to make the complaint more certain; (7) the court erred in overruling the demurrer to the complaint; (8) the court erred in overruling the motion to make the 109th specification of the complaint more certain; (9) the court erred in sustaining the demurrer to the answer; (10), (11), (12) the court erred in sustaining the motion to strike out the *second* and *third* paragraphs of appellant Coddington’s answer; (13) the court erred in overruling the motion for a new trial; (14) the court erred in overruling the motion in arrest of judgment.”

The errors assigned and discussed by appellant Smith are: “(1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling appellant’s demurrer to the complaint; (3), (4), (5) the court erred in sustaining demurrers to the *first*, *second*, and *third* paragraphs of appellant’s answer; (6) the court erred in striking out the *fourth* paragraph of appellant’s answer.”

The following is an abstract of the material parts of the complaint: It is alleged that on May 16, 1896, in a suit in the Randolph Circuit Court, in which the State of Indiana on the relation of the Auditor of State was the plaintiff, and the Citizens Bank was the defendant, the purpose of which was to have the said bank judicially declared insolvent, and to have its affairs placed in the hands of a receiver and wound up, the said appellee Jesse Canaday, was, by the order of the court, appointed such receiver to take charge of, and reduce to his possession, all of the property, rights,

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credits, demands, and choses in action of every description, and however arising, belonging to said bank; that the said Canaday as such receiver was, by the said order, empowered and directed to bring and prosecute in his own name, as such receiver, all actions necessary in the discharge of his duties as receiver; that the said Canaday accepted the said appointment, was duly qualified in the manner required by the statute, and entered upon, and is yet acting in, the discharge of his said duties; that for twenty years a bank of discount and deposit, known as "The Citizens Bank," organized under the statutes of this State, having a capital of \$80,000, had been in existence and carrying on business in Union City, Indiana; that said bank did a large business in receiving deposits, and in buying and selling notes, bills of exchange, and other commercial paper; that said bank owned a large quantity of real estate; that on March 27, 1893, the term of the corporate existence of said bank expired, and that said bank then owned notes, bills, and real estate; that on said 27th day of March, 1893, the Citizens Bank was organized under the laws of this State as a bank of discount and deposit, with a capital of \$60,000, divided into shares of \$100 each, and that the said corporation became the successor of said original "Citizens Bank"; that by the action of the directors of both of said banks, the notes, bills, commercial paper, and real estate of the old bank were transferred and conveyed to ~~the new~~ bank; that from March 27, 1893, until May 6, 1896, the said new bank was actively engaged at Union City in receiving deposits, loaning money, buying and discounting notes, bills, etc., and in carrying on a general banking business; that on May 6, 1896, said bank closed its doors because of its insolvency; that it had been insolvent for six months previously to said date, and that it has done no business since May 6, 1896; that the defendants were directors of said original "Citizens Bank" for five years prior to April, 1893, and that, upon the organization of the new bank, they were elected directors of that corporation, and acted as such, being thereafter

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annually reëlected to that position, and so continuing to act until said new bank ceased to do business; that during all of said time, from March 27, 1893, until May 6, 1896, each of said defendants and directors negligently and carelessly failed to perform his duties, and negligently and carelessly refused and neglected properly, prudently, and carefully to manage the business of the said new bank in this, to wit: The complaint here charges the defendants with some 109 specific breaches of duty. It alleges that they took the real estate held by the old bank at excessive estimates, and carried the same on the books, at such valuations, and in the published statements of the financial condition of the bank, thereby deceiving the public as to its solvency; that said directors took from said old bank \$50,000 of worthless notes, drafts, checks, etc., at their face value, and carried the same on the books of the bank at such face value; that said directors failed to hold regular monthly meetings, but suffered the business of said bank to go by default, in consequence whereof said bank became hopelessly insolvent; that the said directors, at their first meeting, elected one Nathan Cadwalader president of said bank, and his son, Charles H. Cadwalader, cashier thereof, and thereafter kept both of them in said offices; that the said Nathan and Charles H. Cadwalader were engaged in other kinds of business, and were known to said directors to be unfit for said positions, the said Charles being a gambler and libertine; and that neither of said officers gave sufficient time to the business of the said bank, but that they neglected the same; that the said directors negligently failed to require any bond from either the said president or cashier, conditioned for the faithful performance of their duties, by means whereof large sums were lost to said bank; that said directors negligently failed to appoint a finance committee to examine the books of said bank, and to pass upon loans to be made by it, but that they permitted the president and cashier to make all such loans, and to carry on the business of the bank as they pleased, to the great injury of the bank; that large sums

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were loaned and invested by these officers in, and upon, worthless paper, and to irresponsible persons, or without security, whereby the bank was subjected to great losses; that the said directors negligently permitted many depositors to overdraw their accounts; that they suffered the president to buy 100 shares of the capital stock of the bank at a premium of ten per centum, and to pay for the same out of the moneys of the bank; that the said directors negligently failed to examine the books of the bank, and to acquaint themselves with its business and condition, until it became hopelessly insolvent; that the said directors negligently permitted the president of the bank to purchase with the funds of the bank worthless stock of other corporations; that they negligently permitted the president of the said bank to appropriate to his own use \$25,000 of the moneys of the said bank; that they negligently suffered the cashier to appropriate to his own use \$25,000 of the moneys of the said bank; that they negligently permitted the president to make loans of large amounts on mortgages on real estate, which mortgages the president withheld from the records until other equities intervened, and they became worthless, where-  
✓ by the loans were lost to the bank; that the said directors ordered the payment, semiannually, of dividends of five per centum from the time of the organization of the bank, on the whole of the capital stock, when the bank had made no profits out of which they could be paid, and when, in fact, the bank was paying interest on large sums of borrowed money; that the directors negligently permitted the president to sell, at a large discount, great quantities of the bank's funds and bills receivable, to wit, \$50,000 worth; that said directors carelessly and negligently suffered and permitted the president of said bank, after it became insolvent, to transfer large amounts of its bills receivable, etc., to preferred creditors; to transfer worthless notes owned by him to the bank, and to take out their amount in money; to borrow for himself, and for corporations with which he was connected, \$30,000, and to execute worthless paper for the

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same; that the said directors carelessly and negligently permitted the said Charles H. Cadwalader to borrow for himself, and for firms and corporations in which he was interested, \$40,000, either without security, or upon insufficient security, all of which remain unpaid, and that the notes given therefor are worthless; that said directors negligently permitted the president and his relatives to borrow from said bank, on worthless paper, \$60,000. A great number of other similar charges of negligence and official misconduct, more or less specific, are contained in the complaint, but they need not be set out in this statement of the contents of that pleading.

The complaint also charges that the appellants failed to collect the subscriptions to the capital stock of said bank from many of its shareholders, although they were solvent; that they failed to require fifty per centum of the capital stock to be paid in before commencing business, and the whole to be paid in within six months thereafter, and that such capital has never been paid in; that the books of the bank were not properly kept in an intelligible manner, but contained false and fraudulent entries, which were intended to cheat and defraud.

As an excuse for the omission of dates, names and amounts, in many of the specifications of the misconduct of the directors, it is alleged that the plaintiff is unable to give a more definite statement of the transactions for the reason that the directors permitted the books of the bank to be so carelessly kept that these particulars are not shown, and cannot be ascertained.

The pleading concludes with the general charge that by reason of the negligent acts and conduct of the appellants, as therein set out, and their inattention to the business of the said bank, and the abandonment of the said business by them to the management of the president, Nathan Cadwalader, said bank has sustained a loss of \$50,000, to the damage of the bank, etc.

The first question to be determined is that of the juris-



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diction of the court over the subject of the action. Such subject was a claim against the directors of an insolvent corporation for damages alleged to have been sustained by the corporation in consequence of the negligence of the directors. There can be no doubt concerning the jurisdiction of the circuit court in a case of this kind. That jurisdiction is general, and embraces all actions for the recovery of damages resulting from neglect of official duty, misfeasance or malfeasance in office, or breach of trust. §1366 Burns 1901; *McCoy v. Able*, 131 Ind. 417, and cases cited.

The jurisdiction of the court over the subject of the action does not depend on the validity of the demand set forth in the complaint. Even if that pleading fails to show any liability whatever on the part of the directors which a receiver can enforce, the objection goes, not to the jurisdiction of the court over the subject of the action, but to the sufficiency of the facts stated.

The next point made is that the appellee had not the legal capacity to sue. This ground of demurrer under the statute means that the plaintiff is not entitled to sue by reason of some personal disability, or that he has no title to the character in which he sues. It is said in Story's Eq. Pl. (10th ed.), §494: "If an infant, or a married woman, or an idiot, or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur." An uncertificated bankrupt suing in equity for property which had clearly passed to his assignees, that fact appearing on the face of the bill, is cited as an example of an action by a person under a legal disability; and an administrator suing in virtue of the grant of administration in a foreign country, and an unincorporated company suing as a corporation, are mentioned as examples of actions in which there is a defect in the title of the plaintiff to the character in which he sues. This court has decided in many cases that the want of legal capacity to sue, which is



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made a cause of demurrer, has reference to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact, if such be the fact, that the complaint upon its face fails to show a right of action in the plaintiff. *Debolt v. Carter*, 31 Ind. 355, 363; *Dale v. Thomas*, 67 Ind. 570, 572; *Nave v. Hadley*, 74 Ind. 155, 156; *Dewey v. State, ex rel.*, 91 Ind. 173; *Traylor v. Dykins*, 91 Ind. 229; *Pence v. Aughe*, 101 Ind. 317; *Board, etc., v. Kimberlin*, 108 Ind. 449; *Campbell v. Campbell*, 121 Ind. 178.

Is there here any defect of the title of the plaintiff to the character of receiver in which he sues? A receiver may be appointed when a corporation is insolvent, or is in imminent danger of insolvency. §1236 Burns 1901, spec. 5.

If a bank is in an insolvent or failing condition at the time the State Bank Examiner makes an examination, or, if between the periods of examination a bank fails or suspends, the Auditor of State is required to take charge of such bank, and of all the books, notes, cash on hand, and other assets. It is thereupon made the duty of the Auditor of State to apply to the circuit court of the county, where such bank is situated, for the appointment of a receiver for the bank. §2938 Burns Supp. 1897.

It appears from the complaint that the Citizens Bank was a bank of discount and deposit, organized under the statutes of this State; that it became insolvent; and that the Auditor of State, after taking charge of it, made an application to the judge of the Randolph Circuit Court by suit for the appointment of a receiver. It is further shown that the appellee was appointed such receiver; that he accepted the appointment, gave bond, and took the oath prescribed by law. By the terms of the statute, he was empowered, under the control of the court, or of the judge thereof in vacation, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, in his own name, and, generally, to do such acts respecting the property as the court or judge might authorize. §1242 Burns 1901.

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The order appointing the receiver for the Citizens Bank authorized him to take charge of, and reduce to his possession, all of the property, rights, credits, demands, and choses in action of every description, and however arising belonging to the bank. It empowered him to bring and prosecute in his own name, as such receiver, all actions necessary in the discharge of his duties, "whenever in the judgment of said receiver it would be proper to bring and prosecute any such proceedings or suits."

The statute of this State does not attempt precisely to define the powers of a receiver appointed by virtue of its provisions, but indicates, rather, their general scope and object. Among the ends to be attained by a general receivership are the seizure of property in the hands of the defendant, the recovery of such property as has been illegally transferred and for which a suit or action may be maintained, the collection of all claims in favor of the defendant, and, in the case of a corporation, the recovery of all such sums of money as may be due, owing or coming to the corporation upon any account whatever.

The allegations of the complaint sufficiently show that the plaintiff is under no personal disability, and that there is no defect in his title to the character in which he sues. Under the circumstances set forth in the pleading, the appointment of the receiver was authorized by the statute, and the terms of the order of the court were comprehensive enough to authorize him to prosecute the present action.

It is next objected that there is a defect of parties defendant, and that another director should have been joined. If there was another director, that fact is not disclosed by the complaint, and hence no question as to a defect of parties is presented by the demurrer. But, even if it appeared that there were other directors, it was not necessary that all should be sued. The action is not upon a contract, but is for a breach of trust, and arises *ex delicto*. *Brewer v. Boston Theater*, 104 Mass. 378, 399; *Franklin Ins. Co. v. Jenkins*,

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3 Wend. 130; *Attorney-General v. Wilson*, 1 Cr. & Ph. (18 Eng. Ch.) 1; *Peck v. Ellis*, 2 John's Ch. (N. Y.) 131; *Heath v. Erie R. Co.*, 8 Blatch. (U. S.) 347, 395; *Cunningham v. Pell*, 5 Paige (N. Y.) 607; *Wilkinson v. Dodd*, 40 N. J. Eq. 123, 3 Atl. 360; Thompson's Liability of Officers, p. 353, note 3.

It is further contended that there is in the complaint a misjoinder of causes of action, and of parties. A misjoinder of causes of action is a joinder of causes belonging to different classes, such as contract and tort, a money demand on contract, and a claim to recover real property. §279 Burns 1901. We find no such defect in the complaint. The damages claimed are alleged to arise from breaches of trust and official duty on the part of the appellants, and all the specifications of negligence and misconduct belong to a single class. Besides, error in overruling a demurrer for a misjoinder of causes of action, even if such error existed, is immaterial. *Lane v. State*, 27 Ind. 108; *Cargar v. Fee*, 140 Ind. 572; §344 Burns 1901. Misjoinder of parties is not a ground of demurrer. §342 Burns 1901; *Cargar v. Fee*, 140 Ind. 572; *Armstrong v. Dunn*, 143 Ind. 433. There is, however, no misjoinder of parties in this case.

The *first* and *seventh* errors assigned by the appellant Coddington, and the *first* and *second* errors assigned by the appellant Smith, call in question the sufficiency of the facts stated in the complaint, and may be considered together.

The objections taken to the complaint by the appellants are (1) that it does not aver that the court authorized the receiver to bring the present suit; (2) that it does not allege that the assets of the bank in the hands of the receiver are insufficient to pay all lawful claims against the bank; (3) that the charges of negligence are too general to require an answer; (4) that the complaint does not allege that the receiver, and the parties represented by him, were without fault; and (5) that the appellants are not liable for the consequences of the acts and omissions of duty with which they are charged.

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It has already been stated in this opinion that the order appointing the receiver sufficiently authorized him to bring this action. The right to maintain the suit does not depend upon the fact of the insufficiency of the assets in the hands of the receiver to pay all claims against the bank. If the property of the bank was lost or squandered by reason of the gross negligence of the directors, an injury was done to the corporation for which the directors are responsible to the bank, and an action for the damages resulting from such negligence may be maintained by the receiver, although the amount sought to be recovered may not be required to pay the debts of the bank. It will hardly be asserted that for such misconduct, resulting in the waste and loss of the capital of the corporation, the directors are not liable to some one, even where the shareholders are the only persons injuriously affected. But, it is held, that, under such circumstances, no action can be maintained at law by a stockholder. The injury is to the corporation, and not to the individual shareholder. In *Smith v. Hurd*, 12 Metc. 371, 46 Am. Dec. 690, it was said by Chief Justice Shaw: "But an injury done to the stock and capital, by negligence and misfeasance, is not an injury to such separate interest, but to the whole body of the stockholders in common. It is like the case of a common nuisance, where one who suffers a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action. Otherwise, he cannot. \* \* \* But the true answer to the objection is, that stockholders have a remedy, a theoretic one indeed, and perhaps often inadequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common property, by the recovery of damages; and each individual stockholder has his remedy, through the powers thus vested in the corporation, for the common benefit."

It is not denied that the directors may be liable in an action by the receiver where there are debts owing by the

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bank, and the assets in the hands of the receiver are insufficient to pay them. But, it is also clear, that an action may be maintained against the directors for gross negligence resulting in the waste and loss of the capital where there are no debts, and where the shareholders are the only persons to whom the damages recovered could be distributed. At law, the remedy must be enforced through the corporation itself, or by a receiver representing the common interest. In equity, the directors may be held liable as trustees for a fraudulent breach of trust even at the suit of an individual shareholder. *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Hodges v. New England Screw Co.*, 3 R. I. 9. It was therefore unnecessary to aver that there were unpaid claims against the bank, and that the assets in the hands of the receiver were insufficient to pay them. However, if such an averment was necessary, the general allegation of the insolvency of the corporation covers the point.

The objection that the charges of negligence in the complaint were too general to require an answer cannot be allowed upon a demurrer for want of facts. The defect, if it existed, should have been pointed out by a motion to make the allegations more certain.

Neither was the complaint bad for want of an averment that the receiver and the parties represented by him were without fault. If the negligence of the directors was authorized, acquiesced in, or ratified by the corporation, and if such facts were available by way of defense, they should have been set up by answer.

Admitting the truth of all the charges of gross and inexcusable negligence, and the resulting waste and loss of the capital of the bank, as the appellants by their demurrer do, they contend that they cannot be held responsible for these consequences of their breach of duty and official delinquency.

It is true that the directors of a bank of discount and

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deposit, incorporated under the statutes of this State, are not, at least in a technical sense, trustees, and it is said that they cannot be held to a very high degree of diligence in their management of the financial affairs of the bank. They usually serve without pay, and the general conduct of the business of the bank is necessarily entrusted, to a large extent, to the executive officers of the corporation. But, at the same time, the directors are, in a very emphatic sense, officers of the corporation. They have large powers, and important duties, which they can neither evade nor delegate. They are required to take an oath that they will faithfully and honestly discharge their duties as directors. They elect the president and cashier. They must exact from these officers separate bonds with surety, conditioned that they will faithfully and honestly discharge their several duties as such officers. They may make and establish from time to time such by-laws as may be deemed proper, not inconsistent with the banking act, for the regulation and transaction of the business of the bank, the holding of elections for directors, the manner in which stock shall be transferred on the books of the association, and the manner of appointing officers and agents thereof. They must meet, at least once a month, and must keep a record of their acts and proceedings. The general business of the association is under their management and control, and they must cause proper books to be kept of the transactions and business. They must set apart, and retain, ten per centum of the annual net profits of the business of the association as a surplus fund until the same amounts to twenty-five per centum of its capital stock. Neither the association, nor any member thereof, can, during its continuance in business, lawfully withdraw, or permit to be withdrawn any portion of its capital, either in the form of dividends, or otherwise. If losses have been sustained equal to, or exceeding, the undivided profits on hand, no dividend can be made. Nor can any dividend ever be made while such association continues

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its banking operations greater than its net profits on hand, deducting therefrom its losses, and bad debts. All debts due to the bank, on which interest is past due for six months, unless well secured, must be considered bad debts.

All transfers of notes, bonds, bills of exchange, and other evidences of debt owing to the association, or of deposits to its credit; all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable things to its use, or for the use of any of its shareholders or creditors; and all payments of money to either made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets to the proper payment of its just liabilities, or with a view to the preference of one creditor over another, are declared to be utterly null and void. §§2922, 2923, 2924, 2925, 2927, 2928, 2929, 2934 Burns 1901.

The powers and duties of the appellants, as directors of the Citizens Bank, were thus clearly defined by the statute. These obligations were voluntarily assumed, and the appellants were bound to perform them. Though they were important, their proper discharge did not require a large proportion of the time of the appellants, or any great degree of attention to the minor details of the business of the bank. It is certainly true that, if the appellants had performed those duties which the law expressly imposed upon them, the association could not have been subjected to the frauds, abuses, and losses which resulted in its insolvency. The supervision of the directors over the business of the bank should have been such as would have enabled them at all times to know its general financial condition, and to check or prevent imprudent or dishonest conduct by the president or cashier. They had the means of knowing, and they were bound to know, the amount and value of the paper and securities held by the bank. They were also bound to know the character and habits of the men they had placed and



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kept in charge of the bank as its president and cashier. There could be no excuse for their failure to examine the books of the bank, and for their ignorance of the manner in which its business was conducted. Under the statutes of this State, the directors of a bank are the agents of the corporation, having the general custody, control, and management of its property and affairs, and, as such agents, they are liable to account for all of the property of the corporation which has been entrusted to their control and management. For mere errors of judgment, ~~they are not~~ responsible; but for losses and waste of money and property, occurring through their gross inattention to the business of the bank or their wilful violation of their duties, they are liable. The claims of the corporation against the delinquent directors constitute a part of the property of the bank, and are to be treated as debts due to it. Their collection may be enforced by an assignee or receiver duly appointed, and authorized to sue for the sums due from such agents.

The complaint charges, in various forms, a violation of every duty which these appellants, as directors, had undertaken to perform. It shows that the loss and waste of the capital of the bank were the result of such gross negligence of the directors. When it is considered that all of the matters well pleaded in the complaint are admitted by the demurrer, it cannot be said that the facts stated in the pleading are not sufficient to constitute a cause of action in favor of the corporation, and of the receiver as the representative of the common interests.

Motions to strike out parts of the complaint on the ground that they were immaterial, irrelevant, improper and repetitions of other portions of the pleading were made by both appellants, and were overruled by the court. It is well settled that available error cannot be predicated of a ruling of the court refusing to sustain a motion of this kind. *Pfau v. State, ex rel.*, 148 Ind. 539; *Mabin v. Webster*, 129 Ind. 430, 28 Am. St. 199.



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The court properly refused to strike out the entire complaint.

The motion of the appellants for an order requiring the appellee to state in separate paragraphs the several causes of action alleged to be set forth in the complaint was denied by the court. The complaint stated a single cause of action, which consisted of the grossly negligent management of the affairs of the bank by the directors, and their breach of their trust. The various specifications of misconduct were properly combined in a single paragraph.

The rulings of the court upon the motion to make the complaint more certain are next complained of by the appellants. It is true that many of the specifications of the negligence and misconduct of the directors were somewhat general in their averments. It appears, however, from other allegations of the complaint that the appellee was unable to set out the facts more particularly for the reason that the books of the bank, and the records of its business, had been permitted by the appellants to be so loosely and imperfectly kept that the transactions complained of, could not be more specifically described by the pleader. In view of the nature of the action, and of the difficulties created by the negligence of the appellants, we must hold that the motion to make the several specifications of the complaint more certain was properly overruled. Besides, it may be observed, that no injury to the appellants could have resulted from the ruling of the trial court for the reason that the directors had knowledge of the facts, and possessed the means of presenting them to the court or jury.

As a partial defense to so much of the complaint as charged the appellants with liability for accepting certain assets of the old bank in payment of stock subscriptions, the appellant Coddington first answered in a single paragraph setting up substantially that the new bank, with the consent of its stockholders, and acting upon reliable legal advice, accepted the real estate, notes, judgments, etc., of the old bank

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in payment of the subscriptions of the stockholders of the new, and that in consideration of the transfer of this property the new bank agreed that it should be applied in discharge of all legal claims against the old bank; that this agreement and transfer were made before Coddington became a director of the new bank; that the new bank accepted said property and proceeded to use, collect, sell and convert it to its own use, and that the receiver has also sold some of said property, and is attempting to collect the notes, judgments, etc., and otherwise to dispose of, and to convert said property to the use of said new bank. The agreement of the stockholders was in writing, and a copy of it was made an exhibit. Upon demurrer, this answer was held insufficient.

Was the agreement which formed the basis of this defense one into which the new bank could lawfully enter? If not, did the retention and use of the property by the new bank, and its receiver, constitute a bar to an action by the receiver against the directors for negligence in accepting it in payment of subscriptions for the shares of the bank? Both questions must be answered in the negative. It may be suggested that strong reasons exist for holding that the acceptance of anything but money in payment of subscriptions to the capital stock of a banking association is illegal. No authority for such transactions is found in the statutes, and the nature of the business to be carried on seems to forbid them. The purchase of real estate by a banking association, except for use in its business, and under certain special circumstances, is expressly prohibited. §2932 Burns 1901.

Corporations, other than banking, may, perhaps, take property of certain kinds at a reasonable valuation, and under circumstances entirely free from fraud, in payment of such subscriptions, but banks stand upon a different footing, and the reasons which justify such dealings in the one case do not apply in the other. But, even if notes, bills, judgments, and the like, could be taken by the directors in pay-


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ment of stock subscriptions, they could not lawfully be so taken unless there was reasonable ground for believing that they were good and collectible, and of the value at which they were to be received. If they were worthless, as charged in the complaint, it was the duty of the directors of the new bank to refuse to recognize them as payment for such stock subscriptions, and a failure to exercise ordinary care in accepting them in lieu of money was a breach of their duty as the agents of the corporation. Such a transaction was a deviation from the usual course of business, and it devolved on the appellants to show that the notes, bills, judgments, etc., so taken and recognized by them, were of the value at which they were transferred, or that they exercised ordinary care in ascertaining their value, and had reason to believe them to be worth the amounts for which they were taken. An agent, authorized to sell the property of his principal, or to collect debts due to him, is guilty of a gross breach of his duty, if, instead of obtaining money, he carelessly receives worthless paper or securities.

But, the appellants insist that the acceptance of the notes, bills, judgments and real estate by the directors of the new bank, in payment of stock subscriptions, was expressly authorized by the stockholders, and, therefore, the receiver, who represents the stockholders, is estopped from asserting any claim against the directors on this account. If the stockholders alone were interested, the argument of the appellants on this question might deserve serious consideration. The complaint alleges that the corporation is insolvent. The receiver, therefore, represents the interests of the creditors of the bank, as well as those of its stockholders. As against the claims of creditors of an insolvent corporation, the directors cannot shield themselves from liability for gross mismanagement of its affairs by interposing a pretended authorization for their wrongdoing by the stockholders. The partial answer of appellant Coddington, founded upon the stockholders' agreement, did not state a valid defense



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to that part of the complaint to which it was addressed, and there was no error in the action of the court in sustaining a demurrer to it.

The *first*, *second* and *third* paragraphs of appellant Smith's answer also set up the stockholders' agreement, and are substantially the same as Coddington's answer. For the reasons above given concerning the answers of the appellant Coddington, these paragraphs must be held insufficient.

The appellant Coddington filed three additional paragraphs of answer, the last being a denial, and appellant Smith filed two additional paragraphs, numbered *four* and *five*, the *fifth* being a denial. The *second* and *third* paragraphs of Coddington's answer, and the *fourth* paragraph of Smith's answer were stricken out on motion of the appellee. The pleadings so stricken out were copied by the clerk, but, as they have not been brought in by bill of exceptions, they are not a part of the record, and the question concerning the action of the court in striking them out cannot be considered.

The ruling of the court upon appellant's motion for a new trial is assailed upon the grounds (1), that the verdict is not sustained by sufficient evidence; (2), that the court erred in admitting certain evidence over the objections of appellants, and (3), that the court erred in giving, and in refusing to give, certain instructions.

The supposed deficiencies in the proof relate to the appointment of the appellee as receiver, and to the order of the court declaring his powers and duties; and also, to the amount of the damages assessed by the jury.

No attempt was made to bring the whole of the evidence into the record by a general bill of exceptions, but, by a special bill, it is claimed by the appellants, that all of the evidence relating to the appointment of a receiver, and to the term of service of the appellant Coddington as a director of the new bank, is brought before this court. Conceding, without deciding, that this evidence is legally in the record, it seems to be entirely sufficient to sustain the verdict in both

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the particulars referred to. The order of the court appointing the receiver was regularly made, in a proper case, and it conferred on him authority to bring this suit. In regard to the objection that the assessment of damages against the appellant Coddington was excessive for the reason that he was not a director during the months of April and May, 1896, it is to be observed that the allegations of the complaint authorized the assessment of much more than \$50,000 against him, and that, in the absence of the evidence upon these allegations, we cannot presume that the jury assessed any sum against him on account of proceedings which took place when he was not a director.

The objections to the introduction of the record evidence of the appointment of the receiver, and the subsequent proceedings of the court in connection therewith, were not well taken. The fact that the appellant Coddington was neither a stockholder nor a director of the bank when the application for the appointment of a receiver was made, did not render the record of such proceedings incompetent as evidence in an action against him. If he was, in fact, a stranger to that proceeding, he might, by a proper answer, have questioned the validity of the appointment, and the subsequent orders of the court. But, unless want of jurisdiction of the subject, or of the parties, was apparent, the entries of record in that suit were competent evidence of the appointment of the receiver, and of the order of the court authorizing him to sue in his own name for the debts and other property of the insolvent bank.

Objection was also made by the appellant Coddington to the introduction of certain entries in the books of the bank, the ground of such objection being that he was not a director at the times covered by such entries. These records were admitted in evidence because several defendants were before the court, and the evidence was competent as to some of them. There was no error in this. If the appellee failed to show that Coddington was a director at the dates

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of the proceedings and transactions set out in the objectionable entries, then, at the conclusion of the evidence, the appellant should have asked for an instruction to the effect that as to him such entries were not to be considered.

The action of the court in giving, and in refusing to give, certain instructions is among the reasons assigned for a new trial, and it is insisted that there is error in this part of the proceedings. Among the instructions given at the request of the appellee, and excepted to by the appellants, was the following: "(7) The directors of a bank are conclusively presumed to know the business and financial condition of the bank. It is their duty to know whether it is solvent or not, and they cannot avoid responsibility on the ground of their ignorance of the bank's financial condition. They cannot be heard to say that they were not apprised of a fact, the existence of which is shown by the books, acts, and correspondence of the bank, and which would have come to their knowledge but for their neglect, or inattention to the business of the bank."

This instruction is in harmony with the views we have expressed in another part of this opinion, and, as we think, states the law correctly. It should be plainly understood by gentlemen occupying the position of directors of a bank that they are not mere lay figures, but that they have actual and responsible duties to perform, and that by gross inattention to these duties, resulting in the waste or loss of the capital of the bank, they render themselves liable to the corporation. A primary duty is that they should understand the financial condition of the bank. They owe this duty to the shareholders, depositors, and other creditors, and to the public. Ignorance of the important transactions of the corporation, and of the general state of its affairs, unless excusable for some special reason which it is incumbent on them to establish, constitutes no defense to an action for damages for losses occasioned by, or traceable to, their failure to perform their official obligations. It is expressly

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declared by the statute that "the general business of the association is under their management and control, and they must cause proper books to be kept of the transactions and business." The instruction complained of is little more than a paraphrase of the governing statute, and it does not express any too forcibly the obligations and duties of those who voluntarily assume the position of directors of a bank. *State v. Cadwallader*, 154 Ind. 607.

None of the remaining instructions discussed by counsel for appellants is copied into the briefs, nor is there any statement of their substance as required by rule twenty-six. (Rules of 1889) of this court. Nevertheless, we have examined each of these instructions, separately, and also in connection with the entire charge given to the jury. We are satisfied that no error was committed by the court either in giving such as were objected to by appellants, or in refusing to give those asked for by them. The law governing the case was fairly stated in the charge; there was no misdirection of the jury; and the additional instructions asked for by the appellants were not consistent with the views expressed in this opinion.

Finding no error, the judgment is affirmed. Monks, C. J., did not participate in this decision.

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 ELLIS, BY HIS NEXT FRIEND, v. CITY OF HAMMOND.

[No. 19,176. Filed October 10, 1901.]

**TRIAL.—Misconduct of Juror.—New Trial.**—Misconduct of a juror is not available as a ground for a new trial where the complaining party's counsel had knowledge thereof before verdict and made no objection thereto until after verdict was returned. *p. 269.*

**NEW TRIAL.—Evidence.—Surprise.—Trial.**—In order to obtain a new trial under subdivision three of §568 Burns 1901 because of surprise at the testimony of a witness, a motion for a continuance should be made, or that the submission be set aside and the cause withdrawn from the court or jury. *pp. 269, 270.*

**SAME.—Newly Discovered Evidence.**—A new trial will not be granted plaintiff in an action for damages for personal injuries resulting

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from an alleged defective street on newly discovered evidence of physicians as to the character of the injuries sustained. pp. 270, 271. **APPEAL AND ERROR.—Harmless Error.—Instructions.**—A cause will not be reversed because of an erroneous instruction, where the answers to interrogatories affirmatively show that the general verdict was right. p. 271.

From Lake Superior Court; *H. B. Tuthill*, Judge.

Action by Albert M. Ellis, by his next friend, against the city of Hammond for damages for personal injuries caused by an alleged defective street. From a judgment for defendant, plaintiff appeals. *Affirmed.*

*M. M. Bruce* and *O. J. Bruce*, for appellant.

*B. Borders* and *L. Becker*, for appellee.

**JORDAN, J.**—Appellant sought to recover a judgment against appellee for \$10,000 for personal injuries sustained by reason of the alleged negligence of appellee in maintaining a defective sidewalk. A trial by jury resulted in a verdict being returned in favor of the appellee, and along with this general verdict the jury returned answers to a series of interrogatories. The trial court denied appellant's motion for a new trial, and rendered judgment upon the verdict, that he take nothing by his action. The error assigned in this appeal is the overruling of the motion for a new trial. The grounds upon which appellant bases his right to a reversal of the judgment may be enumerated as follows: (1) Misconduct of a juror; (2) surprise at the evidence given by one of his own witnesses; (3) newly discovered evidence; (4) error of the court in giving instruction number eight.

In verification of the first of the above enumerated grounds, appellant in the lower court filed the affidavit of Milo M. Bruce, the attorney who represented him in the cause below, and also his counsel in this appeal. This affidavit discloses that after the jury had retired to their room to deliberate upon a verdict, that the affiant, while in a room adjoining the one where the jury was deliberating, heard one of the jurors make the following statement in the presence



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of the other members: "Since hearing the evidence I went over to the place where the evidence showed that plaintiff was injured and inspected the sidewalk. It is in good repair, and the best piece of sidewalk on North Homan street. I have traveled over the sidewalk many times during the last year, and it is good."

Affiant further stated in his affidavit that he believed that the juror who made this statement was Henry Kersper. It is fully disclosed by this affidavit that appellant's counsel had knowledge of the alleged misconduct of the juror before the jury had agreed upon their verdict. The knowledge of his counsel under the circumstances must be imputed to him. Conceding then, without deciding, that the alleged misconduct was of a character that might vitiate the verdict of the jury, and also that such misconduct was properly presented to the lower court by the affidavit in question, still it is not available in this appeal, because appellant's objections thereto were not seasonably interposed in the trial court under the rule asserted and enforced by the decisions of this court. See *Messenger v. State*, 152 Ind. 227, and cases there cited.

In support of the reason for a new trial on the ground that the plaintiff below was surprised at the evidence given on the trial by one of his own witnesses, he filed the affidavit of his counsel. This affidavit discloses that about two weeks prior to the trial the witness in question stated to the plaintiff's attorney that one of the planks in the sidewalk in dispute "had a dry rot in the side" about a foot long and wide enough for a person to catch his foot in it, and that the plank had been in that condition for about six months prior to the time plaintiff received his injuries. It appears that when the witness was placed upon the stand to testify in behalf of plaintiff, that he denied these facts, and by reason of this denial appellant alleges that he was surprised, etc. Under the third subdivision of our civil code defining causes for a new trial, accident or surprise against which ordinary pru-

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dence could not have guarded is made a ground upon which a new trial may be granted. Section 568 Burns 1901, §559 Horner 1897.

Appellant, it seems, did not move the court for a continuance because of his alleged surprise, but permitted the trial to proceed without in any manner presenting the matter to the court until after the return of the verdict. Had he moved for a continuance, and shown proper grounds therefor, no doubt his motion would have been sustained. In fact the usual procedure, under such circumstances, in the first instance, is either to move for a continuance, or to have the submission set aside and the cause withdrawn from the jury, or court, as the case may be. Where the complaining party neglects to do this, he will, in the event of an unfavorable verdict, be required to establish a very strong and clear case, before a new trial will be awarded him upon the ground of surprise at the testimony of a witness. *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462, and cases there cited; *Kelley v. Kelley*, 8 Ind. App. 606. This, appellant has not done. As to when and under what circumstances a new trial will be granted upon the ground of surprise, see the decisions of this court collected in 2 Woollen's Tr. Proc. §4403.

It is next insisted that a new trial ought to have been granted for newly discovered evidence. But the new evidence which appellant professed to have discovered consisted of facts, to which certain named physicians would testify, in regard to the nature or character of the injury which he has sustained by reason of the accident. These facts, if proved, would bear only upon the question of the amount of damages that should be awarded to plaintiff in the event he sustained his cause of action. The evidence in question would have no tendency whatever to produce a finding or verdict in his favor upon his alleged cause of action, and hence it could have no weight or effect in producing a verdict or finding different from the one returned. Under such circumstances

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a new trial will not be granted for newly discovered evidence. *Simpson v. Wilson*, 6 Ind. 474; *Sullivan v. O'Conner*, 77 Ind. 149; *Morrison v. Carey*, 129 Ind. 277; *Jackson v. Swope*, 134 Ind. 111; *Smith v. State*, 143 Ind. 685.

Even should it be conceded that the eighth instruction given by the court, of which appellant complains, is erroneous, we could not reverse the judgment for that reason, because it is affirmatively shown by the answers of the jury to the interrogatories that the general verdict in this case is right. *Moore v. Lynn*, 79 Ind. 299, and cases there cited. Again, for the further reason that an examination of the evidence discloses that the judgment rendered is correct. §670 Burns 1901.

Judgment affirmed.

## ACME CYCLE COMPANY v. CLARKE ET AL.

[No. 19,073. Filed October 11, 1901.]

**DAMAGES.—Speculative Damages.—Pleading.**—A counterclaim for damages in an action for goods sold and delivered alleging plaintiffs' failure to furnish to defendant a certain machine for the manufacture of bicycle hubs according to contract; that it was well known to all persons at the time the contract was made that the demand for bicycles was so great that it could not be supplied; that there was an unlimited supply on the market of all parts of a bicycle except the hub, but no hubs could be purchased; that claimant was prepared to manufacture hubs for five bicycles a day, and with the machine would manufacture 500 more bicycles per month than it was then doing was insufficient, where it was not shown that claimant was prepared to manufacture more bicycles than it had the capacity to make hubs for, or making preparation for such manufacture, or, if such additional parts were to be purchased, when and from what sources claimant expected to procure such other parts, and whether it had made any engagements for such supplies. pp. 272-279.

**APPEAL AND ERROR.—Striking Out Pleading.**—A cause will not be reversed because of the action of the court in striking out a pleading, where the pleading stricken out contained nothing but immaterial matter. p. 279.

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**APPEAL AND ERROR.—*Special Bill of Exceptions.***—A special bill of exceptions under §642 Burns 1901 must show that the evidence embraced in the special bill was all of the evidence given in the cause upon the subject referred to in the questions and answers set out in the bill. *p. 279.*

**SAME.—*Bill of Exceptions.***—A bill of exceptions must be filed after being signed by the trial judge. *p. 280.*

From Elkhart Circuit Court; *P. L. Turner*, Special Judge.

Action by Henry Clarke and others against the Acme Cycle Company in which defendant sought to recover damages on a counterclaim. From a judgment for plaintiffs, defendant appeals. *Affirmed.*

*J. M. Van Fleet* and *V. W. Van Fleet*, for appellant.

*J. H. State*, *C. W. Miller* and *J. S. Drake*, for appellees.

DOWLING, J.—The appellees sued the appellant upon an account for goods sold and delivered. The answer was a general denial, and a plea of payment. The appellant also filed seven paragraphs by way of counterclaim for damages in the sum of \$15,000. A demurrer to the fourth paragraph of the counterclaim was sustained, and on motion of the appellees the fifth paragraph of the counterclaim was stricken out. A reply in denial of the second paragraph of the answer and answers in denial of the remaining paragraphs of the counterclaim were filed by the appellees. The cause was tried by a jury, and a verdict in favor of the appellees was returned.

The errors assigned and discussed by counsel are the rulings of the court upon the demurrer to the fourth paragraph of the counterclaim, upon the motion to strike out the fifth paragraph of counterclaim, and upon the motion for a new trial.

The fourth paragraph of the counterclaim stated in substance that the appellees sold and agreed to deliver to the appellant, on or before September 20, 1895, one complete hub plant, consisting of one Bardons & Oliver hub machine, and one number four machine fitted up for the second oper-

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ation, both to be complete, with tools; and two number four Bardons & Oliver screw machines, complete, with number two spindle friction gears, etc., for all of which the appellant agreed to pay the appellees \$1,650; that said machinery was not delivered until January 20, 1896; that at the time said contract was made it was well known to all persons that the demand for bicycles was so great that it could not be supplied during the years 1895 and 1896; that while there was at that time in the market an unlimited supply of all the parts of a bicycle except the hubs, no hubs could be purchased, and that all persons well knew this condition would last during the years 1895 and 1896; that the appellant, when said negotiations were pending and said contract was made, was prepared to manufacture five front hubs and five rear hubs per day; that with a machine which would make 125 front hubs, or 75 rear hubs per day, it would manufacture at least 500 more bicycles per month than it was then doing, that the net profit on each bicycle was \$5, and that these facts were contemplated by the parties at the time the contract was made. That, in consequence of the failure of the appellees to deliver said hub plant for four months after September 20, 1895, appellant failed to make 2,000 bicycles, which it would have made if it had been furnished with said hub plant, and that during said period appellant received, and was unable to fill 2,019 orders for bicycles; that appellant's profits on said orders would have been \$5 per wheel on 1,157 wheels, and \$6 per wheel on 862 wheels, and that appellant was thereby damaged in the sum of \$10,957.

The sole ground of the appellant's claim for damages is the alleged loss of contingent anticipated profits. The basis upon which they were estimated was the general demand for bicycles, the scarcity of hubs for these machines, and its belief that with a machine which would manufacture 125 front hubs or 75 rear hubs in a day, it would be able to man-

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ufacture at least 500 more bicycles each month than it was then doing, and that its net profit on each bicycle would be \$5. It is stated in the complaint that these facts were known to, and were contemplated by, the parties at the time the contract was made.

Before passing to the consideration of the rule of damages to be applied in this case, it is to be observed that the complaint is silent in respect to certain facts of much importance even in the view of the law taken by appellant's counsel. We find nothing in the paragraph to indicate that at the time the hub machines were to be delivered the appellant was prepared to manufacture more than five bicycles in a day, or, say, 125 in a month. This seems to have been the limit of its capacity when the contract was made. It was then using machines which could turn out only five front hubs, and five rear hubs in one day. It is not stated that the appellant was manufacturing, or was prepared to manufacture, more bicycles than it had the capacity to make hubs for. If it did so, it must have purchased all of its hubs in excess of those manufactured by its own plant. But, if it had a plant of sufficient capacity to manufacture more than five bicycles in a day, that fact is nowhere stated. It cannot be supposed that a small establishment, capable of turning out only five bicycles in a day, or 125 in a month, could suddenly expand, without considerable additions to its buildings, power, and other machinery, to a capacity of twenty-five bicycles in one day, or 625 in one month. If the appellant had so extensive a plant, or if in anticipation of the great increase in its business it enlarged its works after ordering the hub machines from the appellees, the complaint should have said so. As nothing of this kind is claimed, we must assume that the appellant made no change in its plant before the hub machines were delivered, and that, in fact, it waited to see what the new machines would do, and whether the demand for bicycles would justify it in enlarging its works. If this was the plan of the appellant, and if the

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erection, purchase, or leasing of additional buildings in which to carry on its business, and the purchase, construction and adjustment of a vast quantity of new machinery required for the manufacture of 500 additional bicycles per month was postponed by the appellant until actual delivery of the hub machines by the appellees in January, 1896, it follows that the appellant was not prepared to use the new machines, and that if they had been delivered on or before September 20, 1895, considerable time must have elapsed before the appellant could have been prepared to increase its output from 125 bicycles per month to 625 per month. The hub of a bicycle is an important part of the mechanism, but there are many other parts, and, unless, in addition to machines for making the hubs, the appellant was prepared to manufacture all the other parts of a bicycle, it could not be said that its losses of profits on sales resulted from the failure of the appellees to deliver the hub machines. If the appellant did not intend to manufacture the other parts of the bicycles, but expected to purchase all of them, excepting the hubs, then it seems that it should have been stated with some particularity when and from what sources the appellant expected to procure such other parts and whether it had made any engagements for such supplies. If no such contracts were made by the appellant, how could it be said with any degree of certainty that the appellant could at any time go into the market, and buy all the parts of a bicycle excepting the hubs at such prices as would enable it to make a sure and reliable profit of \$5 on each bicycle? The case as made by the fourth paragraph of the counterclaim stands thus: The appellant says that on July 20, 1895, it had the capacity to manufacture five bicycles a day, and no more. If it had a machine for making hubs alone, which would turn out seventy-five rear hubs or 125 front hubs per day, it could then *manufacture and sell* twenty complete bicycles per day *at a profit of \$5 on each bicycle*. Do the facts stated authorize any such conclusion?

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Upon the breach of a contract to deliver machinery to be used in a manufacturing establishment, the rule is, that "the damages which the injured party ought to receive in respect of such breach of contract are such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." *Hadley v. Baxendale*, 9 Exch. 341; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131, 4 Moak's Eng. Rep. 369; *France v. Gaudet*, L. R. 6 Q. B. 199; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Howard v. Stillwell, etc., Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Harvey v. Connecticut, etc., R. Co.*, 124 Mass. 421, 26 Am. Rep. 673; *Mather v. American Ex. Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Gravel Road Co. v. Cox*, 39 Ind. 260.

The rule refers (1) to such damages as may fairly and reasonably be considered as arising according to the usual course of things from the breach, and (2) to such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. In this case, the loss of profits on the bicycles which the appellant might possibly have manufactured and sold cannot fairly and reasonably be considered as damages arising naturally from the breach of the contract to deliver the hub machines at the time fixed by the contract. If the appellant had provided buildings, machinery, and materials with which to manufacture the additional 500 bicycles per month and if, by the failure of the appellees to deliver the hub machines, it had been deprived of the use, or the opportunity to use such buildings, machinery, and materials, by the default of the appellees, the reasonable value of such use during the period of delay might have been fairly and reasonably considered as damages arising naturally from the breach of the contract to



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deliver. Under such circumstances, the principle on which *Birkey, etc., Co. v. Hascall*, 123 Ind. 502, 8 L. R. A. 65, was decided would apply. But it does not appear that the appellant incurred any expense, or made any preparation whatever in expectation of enlarging its output and sales. Its situation after making the contract seems to have remained just as it was before. In view of these facts, we cannot say that any damages whatever arose in the natural course of things from the failure of the appellees to deliver the machines on or before September 20, 1895. It remains, then, to consider what damages may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. It is not asserted in the counterclaim that notice of any kind was given by the appellant to the appellees of the situation of the appellant, or of its ability to manufacture 500 additional bicycles, or any other number per month, provided it could obtain the hub machines. We do not wish to be understood as intimating that such notice would have made the appellees liable, but we refer to this point only to say that, if notice was required, none was given. It is alleged that the demand for bicycles was in excess of the supply; that all parts of a bicycle, excepting hubs, could be bought in the market; that hubs could not be had; and that these facts were known to every one. But, certainly, proof of knowledge of these facts by the appellee would not be sufficient to establish the proposition that they had in contemplation at the time the contract was made, as the result of a breach of it by the appellee, a loss of profits by appellant of \$5 per bicycle on 500 completed bicycles per month. Such supposed damages consist wholly of imaginary profits. The expected product of the hub machines was only one out of very many of the parts which went to make up a complete bicycle. So many other things must have been obtained by the appellant before it could manufacture a single bicycle, and the contingencies upon which its ability

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to dispose of its product at a profit were so numerous, and diversified, and uncertain, that the loss of such profits could not reasonably be supposed to have entered into the contemplation of the parties. The later English cases indicate that where extraordinary liabilities are to be assumed by a party contracting to deliver goods, it should appear that he understood the nature of the responsibility he was taking upon himself, and that his compensation should include some consideration for the responsibility assumed. Furthermore, these cases intimate that the liability of the party for the extraordinary damages, which might result from a breach of the contract to deliver, should be so plainly understood as to render it one of the terms of the contract that, in case of a failure to deliver the goods, the person guilty of the breach would be responsible for such damages. And the very reasonable observation has been made that, if parties desire to avail themselves of a claim to such damages, they should expressly stipulate for them in the contract itself.

It is not necessary to pursue this subject further. This case is easily distinguishable from all those in which it has been held that the party in default is liable for the loss of future profits. Here there was no outlay, no deprivation of the use of property, no loss upon contracts previously entered into by the appellant. The only damages alleged to have been sustained by the appellant consisted in the loss of future, contingent, speculative, and imaginary profits. The appellant asks us to assume that, if it had received from the appellee a piece of machinery for manufacturing a small, though essential, part of a complicated article consisting of many members, everything else required for the construction of that article could easily have been procured at reasonable prices, and without delay; that the appellant would have been provided with all necessary shops, and warehouses, and workmen; that customers would have been found for its increased product; and that a large profit would have been realized by it upon the sale of every bicycle. But

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all this is merely speculative, and the allegations of the counterclaim furnish no basis upon which the damages, if any, sustained by the appellant can be calculated. It is settled that profits which are speculative and contingent cannot be recovered. *Gravel Road Co. v. Cox*, 39 Ind. 260, and cases cited; *Montgomery, etc., Soc. v. Harwood*, 126 Ind. 440, 10 L. R. A. 532.

(2) The *fifth* paragraph of counterclaim was substantially the same as the *fourth*, except that it claimed damages for the loss of profits on bicycle hubs. For the reasons already set out with reference to the *fourth* paragraph, the *fifth*, if demurred to, must have been held insufficient. This paragraph was stricken out on motion of the appellee, and the ruling is assigned for error. While motions to strike out pleadings are not regarded with favor, yet when the pleading contains nothing but immaterial matter, no sufficient cause of action being disclosed, and a correct result is reached, a judgment will not be reversed because of such a ruling. *Carver v. Carver*, 44 Ind. 265; *McGrew v. McCarty*, 78 Ind. 496; *Harris v. Randolph Co. Bank, ante*, 120.

(3) The remaining questions which the appellant attempts to present relate to the admission of certain evidence over the objection of the appellant, and the misdirection of the jury. An effort has been made to reserve some of these questions by a special bill of exceptions under §642 Burns 1901. The bill, however, contains no statement that the evidence embraced in the special bill was all of the evidence given in the cause upon the subject referred to in the questions and answers set out in the bill. The statement "that neither party had given any evidence of, or concerning, any machines other than those so sold and delivered by the plaintiffs to the defendant," does not necessarily imply that no evidence was given concerning the machines sold by the plaintiffs to the defendant, to which the testimony set out in the special bill might not properly apply. The substance of the evidence admitted by the court was, that the appellee

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had manufactured and sold hub machines similar to those delivered to the appellant to other parties, and that they had made from ninety to 120 front hubs, and eighty-five rear hubs in a day of ten hours. It may be conceded that it was incompetent for the appellees to establish the quality and value of the hub machines sold by them to the appellant by proving the character and efficiency of machines sold by them to other persons. But there may have been evidence on behalf of the appellant that the machines manufactured by the appellees, and sold to appellant, were constructed upon a defective principle and that from some inherent error in their mechanism they could not do the work they were intended to perform. If such proof was made on the part of the appellant, it authorized the introduction of evidence of the practical working of other machines constructed in the same manner, and upon the same principle. In various other ways, the evidence of the appellant "concerning the machines sold and delivered by the plaintiffs to the defendant," may have been of such a nature as to have rendered it proper to prove the working qualities of similar hub machines.

For like reasons, we cannot determine the question of the correctness of the fifth instruction asked for by the appellant. The evidence may have been such that the modification made by the court was proper.

The other questions raised by the appellant relate to other rulings of the court upon the evidence, and to instructions given and refused. The decisions complained of are such as can be presented to this court for review only by bill of exceptions. But the bill in this case was signed by the trial judge June 22, 1899, and was not filed after it had been so signed. The filing on June 8, 1899, by the stenographer before it was signed by the judge was not sufficient. As the evidence and the instructions are not in the record, we cannot consider the alleged errors predicated of them. Judgment affirmed. Baker, J., did not participate in this decision.

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Shaul v. Citizens State Bank.

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## SHAUL ET AL. v. CITIZENS STATE BANK OF NEW CASTLE.

[No. 19,641. Filed October 11, 1901.]

**APPEAL.**—*Case Within Jurisdiction of Justice of the Peace.*—Under the provision of the act of 1901 (Acts 1901, p. 566) no appeal lies to the Supreme or Appellate Court from a judgment on a promissory note not exceeding \$200.

From Hamilton Circuit Court; *John F. Neal*, Judge.

Action by Citizens State Bank of New Castle against Isaac Shaul and others on a promissory note. From a judgment in favor of plaintiff for \$131.75, defendants appeal. *Appeal dismissed.*

*I. W. Christian, W. S. Christian and E. E. Cloe*, for appellants.

*Geo. Shirts and W. R. Fertig*, for appellee.

MONKS, C. J.—Appellee brought this action on a promissory note for \$100 with interest, and recovered judgment against appellants for \$131.75. Appellee moves to dismiss the appeal on the ground that the same is a civil action within the jurisdiction of a justice of the peace, and is, therefore, not appealable.

Section 6 of the act of 1901 (Acts 1901, p. 566), being §1337f Burns 1901, provides that no civil case within the jurisdiction of a justice of the peace can be appealed to the Supreme Court or Appellate Court, except as provided in §8 of said act. Said §8, being §1337h Burns 1901, provides for an appeal to the Supreme Court in cases unappealable under said §6 (1337f), *supra*, only when “there is a question, and such question is duly presented, either the validity of a franchise, or the validity of an ordinance of a municipal corporation or the constitutionality of a statute, State or federal, or the proper construction of a statute, or rights guaranteed by the State or federal Constitution.”

Section 1500 Burns 1901, §1433 R. S. 1881 and Horner 1897, provides that “Justices of the peace shall have

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jurisdiction to try and determine suits founded on contracts or tort, where the debt or damage claimed or the value of the property sought to be recovered does not exceed \$100, and concurrent jurisdiction to the amount of \$200."

This action, being on a promissory note for not more than \$200, was clearly within the jurisdiction of a justice of the peace. The fact that the amount of the principal and interest of said note was more than \$100 is immaterial, for the reason that a justice of the peace, under §1500 (1433), *supra*, has jurisdiction in actions like this to the amount of \$200.

As no question mentioned in §8, §1337h, *supra*, is presented, this action is not appealable. The motion to dismiss the appeal is, therefore, sustained. Appeal dismissed.

## BAUM v. THE STATE.

[No. 19,688. Filed October 22, 1901.]

**ELECTIONS. — Bribery. — Criminal Law. — Disfranchisement. — Infamous Crime. — Constitutional Law.** — The offense of vote selling being understood and regarded from the earliest times as an infamous crime, the act of 1899 (Acts 1899, p. 881) defining the crime of vote selling or bribery, and affixing the penalty of disfranchisement, is within the authority expressly granted by §8 article 2 of the Constitution, although vote selling was not by statute made an infamous crime at the time of the adoption of the Constitution. *pp. 283-286.*

**SAME. — Bribery. — Criminal Law. — Disfranchisement. — Reward. — Constitutional Law.** — The act of 1899 (Acts 1899, p. 881) fixing disfranchisement as a penalty for vote selling and providing a reward to any person procuring the testimony necessary to secure a conviction of any person violating the same is not unconstitutional in that it grants immunities to and protects one class of citizens, and punishes another class, each class being guilty of the same offense. *p. 286.*

**SAME. — Bribery. — Indictment.** — In a prosecution for vote selling under the act of 1899 (Acts 1899, p. 881) it is not necessary that the affidavit and information state the names of the candidates, the purpose of the election, and the place where the election was to be held. *pp. 286, 287.*

**CRIMINAL LAW. — New Trial.** — Insufficiency of the evidence to sustain the verdict is not a cause for a new trial in a criminal action. *p. 287.*

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From Montgomery Circuit Court; *Jere West*, Judge.

Henry Baum was convicted of selling his vote and disfranchised. From the judgment he appeals. *Affirmed.*

*M. E. Clodfelter, H. N. Fine and I. C. Dwiggin*s, for appellant.

*W. L. Taylor*, Attorney-General, *C. C. Hadley, Merrill Moores* and *F. P. Mount*, for State.

DOWLING, J.—The appellant was tried and convicted upon an affidavit and information charging him with the offense of selling his vote at the November election, 1900, in violation of an act of the legislature approved March 4, 1899 (Acts 1899, p. 381), §2329 Burns 1901. By the judgment of the court, the appellant was disfranchised and rendered incapable of holding any office of trust or profit for the term of twelve years.

Error is assigned upon the overruling of the motion to quash the affidavit and information. The grounds of this motion were, that the statute upon which the prosecution was founded is in conflict with §§1, 2, 8, of article 2 of the Constitution of this State, and that the affidavit and information did not state facts sufficient to constitute a public offense.

More specifically stated, the constitutional objections taken to the statute are (1) that the crime defined by it is not an infamous crime, and therefore not subject to the punishment of disfranchisement; (2) that it grants immunities to and protects one class of citizens, and punishes another class, each class being guilty of the same crime, and (3) that it prevents the freedom and equality of elections.

The sections of the act, under which the appellant was tried and adjudged guilty, are in these words:

“Sec. 1. That whosoever sells, barter<sup>s</sup>, or offers to sell or barter his vote, or offers to refrain from voting for any candidate or candidates for any office at any general, special or

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primary elections or convention, either for money or property, or thing of value, or for any promise or favor or hope of reward, or who shall accept any money, property, or thing of value, with the promise or pretense of voting for, or refraining from voting for any candidate or candidates, shall upon conviction therefor be disfranchised and rendered incapable of holding any office of profit or trust, for a period not less than ten years nor more than twenty years.

“Sec. 2. Any person or persons having knowledge or information of the violation of the provisions of this act, who shall procure or furnish or cause to be procured or furnished the testimony necessary to secure a conviction of the person or persons violating the same shall be entitled to a reward of \$100 payable out of the treasury of the county in which such conviction shall be had and the right to such reward shall be a valid claim against such county.”

Section 8 of article 2, one of the provisions of the Constitution with which the statute is alleged to conflict, reads thus: “The General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime.”

It is contended on behalf of the appellant that this constitutional provision is a limitation upon the power of the legislature, and that no person can be disfranchised for an offense which is not an *infamous* crime. Counsel insist that the words *infamous crime* must be construed to apply only to such criminal offenses as were understood to be infamous in their character when the Constitution of 1851 was adopted; that, at that time, the offense of vote selling was not an infamous crime; and, hence, that the legislature could not disfranchise a person convicted of that offense.

While it is true that the revised statutes of 1843 declared that certain crimes should be deemed infamous, and that vote selling was not among them, yet this provision cannot be regarded as conclusive of the question of what crimes were then understood to be infamous. R. S. 1843, §79, p. 999.



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The Constitution of 1816 contained a provision substantially like that of §8 of article 2 of the Constitution of 1851; but while that provision was in force, the General Assembly affixed the penalty of disfranchisement to many offenses which were not included in the list of crimes declared to be infamous by the statutes of 1838, or 1843. The revised statutes of 1843 mention, among other offenses for which the punishment of disfranchisement may be inflicted, attempting to restrain the freedom of election by threats, interference, bribery, etc.; voting or attempting to vote more than once; grand larceny; petit larceny; professional gambling, and many others.

If it is conceded that the character of the offense, i. e., whether infamous or not, is to be determined by the punishment, it will be found that at common law the deprivation of civil and political privileges was considered an infamous punishment.

It is said in Cooley's Constitutional Law, p. 29: "But the punishment of the penitentiary must always be deemed infamous; and so must any punishment that involves the loss of civil or political privileges."

So that at the time of the adoption of the present State Constitution, the words *infamous crime* must have been understood by the framers of that instrument as embracing not only crimes punishable by imprisonment in the penitentiary, but also all such offenses as were subject to the penalty of the loss of civil and political privileges.

In *Rex v. Pitt*, and *Rex v. Mead*, 3 Burr, 1335, Lord Mansfield said: "Bribery at elections for members of parliament must undoubtedly have always been a crime at common law; and consequently punishable by indictment or information."

And in 1 Cooley's Blackstone's Com. 179, the author says: "Thus are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion.

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But the greatest danger is that in which themselves coöperate, by the infamous practice of bribery and corruption, to prevent which it is enacted, that no candidate shall, after the date (usually called the *teste*) of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected; on pain of being incapable to serve for that place in parliament. And if any money, gift, office, employment, or reward be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such bribe, forfeits 500£., and is forever disabled from voting and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offense." In a note upon this passage, it is said: "In like manner the Julian law *de ambitu* inflicted fines and infamy upon all who were guilty of corruption at elections; but, if the person guilty convicted another offender he was restored to his credit again."

From these authorities and enactments, we think it evident that corruption at elections has from the earliest times been regarded as an infamous crime, subject to severe penalties, and frequently punished by depriving the guilty person of his right to vote and to hold office. This offense being so understood and stigmatized, it follows that a statute defining the crime of vote selling, or bribery at elections, and affixing a penalty of disfranchisement, was within the authority expressly granted in the Constitution to the legislature.

The other constitutional objections to the statute are groundless. It grants immunities to no one, and protects no class of offenders from punishment. And so far from preventing the freedom and equality of elections, it tends in the strongest manner possible to promote them.

(2) It is objected, in the next place that the facts stated

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in the affidavit and information do not constitute a public offense, because no candidates are named, and the purpose of the election, and the place where it was to be held, are not mentioned.

These averments were not necessary. It was sufficient to charge the offense in the language of the statute. If the position of counsel for the appellant is correct, the law might be violated with impunity at any time before candidates were nominated, or the places for holding the election were fixed. Neither are the affidavit and information bad for duplicity. They describe a single offense, which consisted of the sale of the vote of the appellant with the promise that he would vote for the candidates on a certain ticket at the general election to be held on November 6, 1900.

(3) For the reasons already given, there was no error in overruling the appellant's motion in arrest of judgment.

(4) Under the assignment that the court erred in overruling the appellant's motion for a new trial, it is insisted that there was error in refusing to give certain instructions requested by appellant, and in modifying certain others, and that the evidence is insufficient to sustain the verdict.

We have carefully examined the instructions tendered on behalf of the appellant, and the modifications made by the court, and are of the opinion that the instructions numbered six, seven, eight, and ten did not contain a correct statement of the law; and that the modifications made in instructions numbered one, two, and five were proper and necessary.

(5) The last ground of the motion for a new trial discussed by counsel is the alleged insufficiency of the evidence to sustain the verdict. This is not a cause for a new trial in criminal actions. Treating it, however, as an assignment that the verdict of the jury was contrary to the evidence or to law, we have made a thorough examination of the testimony with the result that, in our opinion, the verdict is in harmony both with the law and the facts.

We find no error. Judgment affirmed.

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157	288
158	706

157	288
159	168

**THE STATE v. THE CLEVELAND, CINCINNATI, CHICAGO  
AND ST. LOUIS RAILWAY COMPANY.**

[No. 19,517. Filed October 28, 1901.]

**RAILROADS.—Reporting Arrival of Trains.—Blackboard Law.—Size of Board.**—A railroad company is not liable under the penalty section of the act of 1889 as amended by the act of 1897 (Acts 1889, p. 279, Acts 1897, p. 176) for maintaining a blackboard thirty-four inches long and eighteen inches wide instead of three feet long and two feet wide for the announcement of the arrival of trains, since the penalty applies for failure to make the required report of trains, not for failure to maintain a blackboard of the dimensions specified.

From Fountain Circuit Court; *Joseph M. Rabb*, Judge.

Action by State against the Cleveland, etc., R. Co., to recover penalties for failure to maintain blackboard of dimensions provided by statute for the announcement of the arrival of trains. From a judgment in favor of defendant, plaintiff appeals. *Affirmed.*

*J. W. Brissey* and *L. Nebeker*, for State.

*J. T. Dye* and *L. J. Hackney*, for appellee.

**HADLEY, J.**—Action to recover penalties for violation of the provisions of the act of 1889 (Acts 1889, p. 279) as amended in 1897 (Acts 1897, p. 176), commonly known as the "Blackboard law". Demand \$20,000. A demurrer was sustained to each of the two paragraphs of complaint, and plaintiff refusing to amend, judgment was rendered against it.

The single question presented for decision is whether the penalty provided by section two of the statute is recoverable in a case where the defendant has complied with all the provisions of the law, except in the use of a blackboard "not less than *three feet long and two feet wide.*" Or in other words, is the defendant liable solely because of using a blackboard thirty-four inches long and eighteen inches wide? The statute reads: "Sec. 1. That every corporation, com-

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pany or person operating a railroad within this State, shall immediately after taking effect of this act, cause to be placed in a conspicuous place in each passenger depot of such company located at any station in this State, at which there is a telegraph office, a blackboard at least three feet long and two feet wide, upon which such corporation, company or person, shall cause to be written, at least thirty minutes before the schedule time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on schedule time or not, and if late, how much: Provided however, That any device, indicator or register, painted or printed in large letters and figures giving the required information set forth in this act, in a more legible form than is practicable on a blackboard, may be substituted in place of said blackboard: And, provided further, That the provisions of this act shall not apply to any freight train carrying passengers, or any train carrying both freight and passengers, or to any stations during hours when railroad companies do not regularly have a telegraph operator or operators on duty at any such telegraph office. Sec. 2. That for each violation of the provisions of this act, in failing to report or in making a false report, such corporation, company or person so neglecting or refusing to comply with the provisions of this act shall forfeit and pay the sum of \$25, to be recovered in a civil action, to be prosecuted by the prosecuting attorney of the county in which the neglect or refusal occurs, in the name of the State of Indiana, one-half of which shall go to said prosecuting attorney and the remainder shall be paid over to the county in which such proceedings are had, and shall be part of the common school fund."

In substance it is alleged in the second paragraph of complaint that at no time between stated dates did the defendant, in or about its said passenger depot, cause to be placed, or cause to be written upon, a blackboard which was at least

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three feet long and two feet wide the things required by the statute; and in the third paragraph—that at no time between the same dates did the defendant, in or about its said passenger depot, cause to be placed or cause to be written upon a blackboard of greater dimensions than thirty-four inches long and eighteen inches wide the things required by the statute.

The statute, being penal, is subject to the rule of strict construction. 23 Am. & Eng. Ency. of Law, 378; Sedgwick on Stat. Con. pp. 296, 302; Endlich on Stat. Con. §340; Black on Int. of Laws, p. 300.

Strict construction requires us to confine the operation of the statute to the subjects specified. *Western Union Tel. Co. v. Steele*, 108 Ind. 163.

“A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it.” *Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Burgh v. State, ex rel.*, 108 Ind. 132.

While the rule of strict construction will not sanction the abridgment of the manifest intention of the legislature, it must be said that it requires the solution of doubts and ambiguities against the infliction of penalties, and forbids the exaction, when the right is not clearly apparent from the terms of the act itself. The court must interpret such a statute as it finds it. It can not supply omissions by intendment. The trend of the authorities is clearly expressed in these words: “Where the penal clause is less comprehensive than the body of the act, the courts will not extend the penalties provided therein to the classes of persons or things not embraced within the penal clause, even where there is a manifest omission or oversight on the part of the legislature.” 23 Am. & Eng. Ency. of Law, 382; *Brooks v. State*, 88 Ala. 122, 127, 6 South. 902; *State v. Mayor*, 47 Atl. (N. J.) 440; *United States v. Hadden*, 2 Paine 162; *Thomas v. Stephenson*, 2 Ell. & Bl. 108, 75 E. C.

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L. 107; *Broadhead v. Holdsworth*, L. R. 2 Exch. 321; *Underhill v. Longridge*, 29 L. J. Mag. Cas. 65; *Coe v. Lawrance*, 1 Ell. & Bl. 516, 72 E. C. L. 516; *Daniels v. State*, 150 Ind. 348, 358.

It is important to note the peculiar language of the penalty section of the statute, to wit: "That for each violation of the provisions of this act *in failing to report, or in making a false report*" such corporation shall forfeit, etc. The first or civil section imposes upon railroad companies the duty (1) to cause a blackboard not less than three feet long and two feet wide to be placed in or about its passenger stations, (2) in a conspicuous place, (3) to write upon such board the time of arrival of its passenger trains, and (4) to do such writing not less than thirty minutes before the scheduled time of arrival of its trains. While it was undoubtedly competent for the legislature to attach a penalty to the failure to put up a blackboard of the prescribed dimensions, and to the failure to put it up in a conspicuous place, and likewise to the failure to write the required information upon the blackboard at least thirty minutes before the time for the arrival of its trains, it was equally competent for that body to omit a penalty for such things, and impose it upon the neglect of what it deemed a more important duty. The obvious purpose of the act, as suggested in *State v. Indiana, etc., R. Co.*, 133 Ind. 69, 18 L. R. A. 502, was to require railroad companies to give out to the waiting public information as to the time of arrival of its trains. The means to that end are enjoined, but the only source of benefit to the public is the information required, and its timely and accurate communication in writing is the only thing of grave importance to be safeguarded with a penalty. If the public is timely and correctly served it can make no material difference whether the information is received from a blackboard thirty-six by twenty-four inches or from one thirty-four by eighteen inches. In any case the subject was for the consideration and treatment of the lawmakers, and if they in creating

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several duties declared that a breach of the one, clearly the most important, shall be visited with a forfeiture of \$25 for each offense, and fail to make a similar declaration as to the others, to assume that they meant more than they expressed, would be treading on dangerous, as well as forbidden, grounds.

We hold, therefore, that the penalty clause of the statute in question does not apply to the size of the blackboard.

Judgment affirmed.

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 SHERIDAN BRICK WORKS v. MARION TRUST COMPANY,  
ADMINISTRATOR, ETC.

[No. 19,566. Filed October 23, 1901.]

**RECEIVERS.—Appointment.—Corporations.**—Plaintiff as administrator brought suit against defendant, a corporation engaged in the manufacture of brick, on certain promissory notes aggregating \$45,000 and asked for the appointment of a receiver *pendente lite*. The complaint showed that decedent and two other parties held the entire stock of the corporation and composed its directorate, decedent being the president and manager. The stockholders were unable to agree upon the selection of a president and director to fill the vacancy made by death of decedent, the works remained idle, and the company had no money to operate them or to pay its indebtedness. *Held*, that the complaint showed sufficient ground for the appointment of a receiver. *pp.* 293-300.

**CORPORATIONS.—Appointment of Receiver.**—The rule requiring members of a corporation to seek redress from the officers of the corporation for any wrong done them as shareholders before applying to a court of equity for relief does not apply where there is no directory or governing body to which an application for redress could be made. *pp.* 298-300.

**APPEAL AND ERROR.—Receivers.—Evidence.**—The rule that the Supreme Court will not weigh the evidence on appeal has no exception in a proceeding for the appointment of receiver. *p.* 300.

From Marion Superior Court; *J. M. Leathers*, Judge.

Action by Marion Trust Company as administrator of the estate of Mason J. Osgood, deceased, against the Sheridan Brick Works on certain promissory notes, and for the ap-

157	292
161	462
161	463
161	464
157	292
164	698



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pointment of a receiver. From an order of court appointing a receiver, defendant appeals. *Affirmed.*

*L. D. Hay, J. W. Bowlus and C. C. Hadley*, for appellant.

*A. C. Ayres, A. Q. Jones and J. E. Hollett*, for appellee.

JORDAN, J.—Appellee, the Marion Trust Company, as the administrator of the estate of Mason J. Osgood, filed an amended complaint in the lower court consisting of twenty-one paragraphs; in each of these, except the last, it sought to recover against appellant on certain promissory notes in favor of its decedent's estate. These notes in the aggregate amount to \$45,000. By the last paragraph of the complaint appellee sought for the appointment of a receiver *pendente lite*. After hearing the evidence introduced by each of the parties, the court made an interlocutory order whereby a receiver was appointed for said corporation, and for a reversal of that order this appeal is prosecuted. The errors assigned relate to the insufficiency of the complaint and to the alleged error of the court in appointing a receiver under the evidence.

The material facts, among others, set forth in the paragraph of complaint in question may be summarized as follows: Appellant is a corporation engaged in the manufacture of brick, and its principal office is located in the city of Indianapolis, Indiana. It is engaged in operating two plants in the manufacture of brick, one of which is situated in the town of Sheridan, Hamilton county, and the other at Brazil, Clay county, Indiana. The capital stock is \$50,000, divided into 500 shares, of which 250 are owned and held by Oliver H. Root and 249 shares are owned and held by the estate of Mason J. Osgood, and one share is owned by Aquilla Q. Jones. Mason J. Osgood died on December 10, 1900, and previous to his death, he, together with said Oliver H. Root and Aquilla Q. Jones, constituted the directory of the corporation. Osgood at the time of his death was also the

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president and manager of the concern, and Root was the secretary and treasurer thereof. The company is indebted to the estate of Mason J. Osgood of which the Marion Trust Company is the administrator, in the sum of \$45,000, which indebtedness is past due and unpaid and the company has no funds out of which to pay and discharge said indebtedness. The brick works of the company situated at Sheridan are idle, and the company has no money to operate them, and because of their not being operated they are rapidly deteriorating in value. Prior to and at the death of Osgood, the company's president, there existed a disagreement among its officers and stockholders in respect to the management of the concern, and this disagreement still continues to exist and thereby the affairs of the company are in an unsettled condition. On the 3rd day of January, 1901, a meeting was held by the stockholders for the purpose of filling the vacancies which had resulted in the directory and in the office of president by reason of the death of Osgood, but the stockholders were unable to agree upon persons to fill said vacancies, and by reason of the continuance of such disagreement these offices remain vacant, and the company has no president or manager and but two directors, and will continue in this condition for the reason that the stockholders can not or will not agree upon some one to fill said offices. Root, the secretary and treasurer, and also one of the two directors, has refused to call any meeting of the company for the purpose of endeavoring to elect a third director and a president, and by reason of this condition of the company its business and property are in danger of and liable to be dissipated and irreparably injured unless a receiver is appointed by the court to take charge of and manage the affairs of the corporation. Sections two and four of article one of the company's by-laws, as set out in the complaint, are as follows: Section 2. "The president shall preside at all meetings of the company and shall be the manager and have active control of the business affairs of

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the company. He shall approve all bills and countersign all checks given for disbursements by the company." Section 4. "The treasurer shall receive and hold all funds of the company and shall place them on deposit to the credit of the company in such bank or banks as the board of directors may order or direct. He or she shall make no disbursements unless especially directed to do so by either the president of the company or board of directors. The president of the company shall countersign all checks with the treasurer."

In compliance with these by-laws, the funds of the company for a long time prior to the death of Osgood had been deposited in the Fletcher National Bank of Indianapolis, to be checked out only as provided by the by-laws. At the time of the death of Mason J. Osgood, its president, the company had on deposit in said bank \$1,305.42, and this money can not now be drawn or used by the company for the reason that there is no president to countersign the checks drawn upon said bank as provided by the by-laws. Oliver H. Root, the secretary and treasurer and one of the directors as heretofore stated, in violation of the by-laws of the company, as alleged, is assuming to manage the business of the concern and is neglecting to deposit the money in the bank as the by-laws direct. The company has no officer authorized to manage its affairs or to approve bills, or countersign checks drawn upon banks. That by reason of all which its affairs have become complicated and there are numerous creditors who are likely to commence suits against said company, to enforce the payment of their claims, and its assets and property are liable to become dissipated and destroyed, and the company is in danger, it is alleged, of becoming insolvent. Appellant contends that the complaint upon which the order appointing a receiver is based does not state facts sufficient to authorize the appointment. The contention is that appellee, the moving party, under the facts therein alleged, is shown to occupy only the position of a creditor, and as such,

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in order to secure the appointment of a receiver it must further be shown that it has a lien on the property of appellant or an equitable claim thereto. Reviewing the facts as alleged in the amended complaint, we find that they disclose that appellee's decedent at the time of his death was a large stockholder in appellant corporation, and that this stock is now held by appellee as the representative of his estate. The entire stock, it appears, was held by three persons, Root, Jones, and Osgood, appellee's decedent, and these three constituted the directory of the corporation. Osgood at the time of his death was the president and manager of the concern. The by-laws set out and embodied in the complaint show that the president has the active control of the company's business affairs and is required to approve all bills and countersign all checks, etc. Osgood in addition to his being a stockholder was also at the time of his death a creditor of the company holding claims due against the same to the amount of \$45,000. It also appears that appellant in addition to this indebtedness was indebted to other persons to the amount of \$15,000, and that it has no money with which it can meet and pay its said indebtedness. It is further disclosed that by reason of being without money or means to defray its necessary operating expenses one of its plants is idle and is fast deteriorating in value. Root holds one-half the stock, and Osgood's estate together with Jones holds and controls the remainder. By reason of disagreement and dissension upon the part of these stockholders, the vacancy in the directory and also in the office of president, occasioned by the death of Osgood, still continue unfilled. It is charged that Root is wrongfully, and in defiance of the by-laws of the corporation, attempting to manage its business, and that its property is in danger of being dissipated and injured, and that the corporation is in danger of becoming insolvent, etc. It is certainly evident, under the facts, that the interest which the estate of Osgood, represented by appellee, has in the corporation in question is of a

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dual or twofold character, namely, that of a stockholder and also that of a creditor. The facts show that since the death of Osgood the company has but two directors while the governing statute under which it was organized and operated expressly requires that its business shall be managed by not less than three directors. Section 5054 Burns 1901. This section also provides that the directory shall elect a president. It is manifest then that until the vacancy in the directory is filled no president can be rightfully chosen, and the corporation will continue to be without any legitimate governing body or head to carry on or conduct its business affairs. In this state it seems that the company is confronted with the fact that it has no available means to operate its plant and that its property is, by reason of its unfortunate condition, deteriorating in value. Notwithstanding the condition, however, in which the concern has been placed, it seems that Mr. Root, one of its stockholders, is attempting, without right, to manage and control its business affairs. Section 1236 Burns 1901 provides that "A receiver may be appointed, \* \* \* in the following cases: \* \* \* *Third*, In all actions, when it is shown that the property, \* \* \* in controversy is in danger of being lost, removed, or materially injured. \* \* \* *Fifth*, when a corporation \* \* \* is insolvent, or is in imminent danger of insolvency, \* \* \*. *Seventh*, And in such other cases \* \* \* where, in the discretion of the court, or the judge thereof in vacation, it may be necessary to secure ample justice to the parties."

In *Mead v. Burk*, 156 Ind. 577, in considering the force and effect of this last clause of the above section, we said: "Under its authority a receiver may be appointed in any case in which, according to the established rules of equity, the appointment may be necessary 'to secure ample justice to the parties,' without regard to the form or character of the principal action. *Hellebush v. Blake*, 119 Ind. 349; *Connelly v. Dickson*, 76 Ind. 440; *Wayne Pike Co. v. Ham-*

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*mons*, 129 Ind. 368; *Goshen, etc., Co. v. City Nat. Bank*, 150 Ind. 279."

It is true that a court generally will, and should, decline to appoint a receiver in any case where it has no reason to believe that a benefit will result from the appointment. Beach on Receivers § 7; Smith on Receivers § 5. But a court confronted with the facts and circumstances as they are shown to exist in this case would certainly have cause to believe that a temporary transfer, at least, of the management and control of the property and affairs of this headless concern, to the hands of a receiver, under the supervision of the court, would be of more benefit to all concerned than to permit the corporation to remain and continue in its condition as shown to exist. A proceeding to secure the appointment of a receiver *pendente lite* is not an independent proceeding. It is but ancillary or auxiliary to the main action, and is not the ultimate purpose or object contemplated by the principal action. *Iron Hall v. Baker*, 134 Ind. 293, 20 L. R. A. 210; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. 209.

It is true that the applicant or moving party for a receiver in all cases, in order to prevail, must show, among other things, that he has a present existing interest, or at least a probable right or interest in or to the property, fund, or assets over which he seeks to have a receiver appointed. *Iron Hall v. Baker, supra*; *State v. Union Nat. Bank, supra*; *Steele v. Aspy*, 128 Ind. 367; *Mead v. Burk*, 156 Ind. 577.

We recognize the general rule for which appellant contends that the legal relations existing among the members of a corporation require them first to seek redress from its officers for any wrong done to them as shareholders before applying to a court of equity for relief. But this rule is subject to well recognized exceptions, the principal one of which is that the rule is not applicable when it appears that such application in the first instance to the officers of the

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corporation for such redress would be unavailing to protect the rights of the shareholder or shareholders. The exception will certainly apply in the case at bar, so far as the estate of Osgood as a stockholder is concerned, in the appointment of a receiver, for, under the facts as previously shown, it appears that there is no directory or governing body to which an application for redress could be made. Neither can it be asserted that this proceeding is an unwarranted attempt on the part of appellee to wrest the management and control of appellant's affairs from its legally constituted officers, and turn its property and business over to the management and control of a receiver. It virtually has no directory or governing body to control its affairs, and by reason of the alleged dissensions or disagreements existing among its stockholders, this condition bids fair to continue for an indefinite time. The ultimate object of the principal suit in this case is to recover a judgment against appellant for \$45,000, due to the estate of Osgood. This estate, as a stockholder and as a creditor, is interested in and has a right to have the affairs and business of appellant properly and legally managed and conducted, and its funds and property protected, preserved, and properly applied to a legitimate use or purpose, in order that the indebtedness may be paid. As a stockholder it is also interested in having the corporation preserved, and not dissolved, so that subsequently if expedient the management and control of its business and property may be returned by the court to its legally constituted officers. We are aware of the rule contended for by appellant, that the appointment of a receiver is an extraordinary and harsh remedy and as a general rule is not awarded where there exists a complete or adequate legal remedy. But under the facts in this case we think it was eminently proper for a court of equity to interpose its prerogative and appoint a receiver pending the litigation. *Wayne Pike Co. v. Hammons*, 129 Ind. 368; *Hellebush v. Blake*, 119 Ind. 349; *Iron Hall v. Baker*, 134 Ind. 293;

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*Goshen, etc., Co. v. City Nat. Bank*, 150 Ind. 279; *Smith on Receivers*, p. 361; *Conro v. Gray*, 4 How. Pr. 166; *Sage v. Memphis, etc., R. Co.*, 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; *Cook on Stockholders, etc.*, §684, footnote 2; *Morawetz on Priv. Cor.* §§284, 285.

We conclude that the amended complaint under the facts therein averred is sufficient to justify the court in appointing a receiver.

It is finally urged that the order of the court is not supported by sufficient evidence. It is true that the evidence in regard to some of the points in issue is conflicting, but there is evidence which fully sustains the complaint in all respects. The rule that this court will not weigh the evidence on appeal has no exception in a proceeding to appoint a receiver. In such cases, as in all others, there must be such a deficiency of evidence on some material point as to raise a question of law before this court will be justified in disturbing the order of the lower court upon the evidence. *Mead v. Burk*, 156 Ind. 577.

The evidence in the record in this case in our opinion discloses such a state or condition in respect to appellant that to leave longer its property and business affairs to be managed and controlled without any head or governing body would, it appears, result in irreparable injury or damage to both its stockholders and creditors.

The interlocutory order appointing the receiver is in all things affirmed.

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CHAPMAN v. THE STATE.

[No. 19,657. Filed October 24, 1901.]

**CRIMINAL LAW.—New Trial.—Verdict Contrary to Law.**—An assignment in a motion for a new trial in a criminal cause that the verdict was contrary to law is sufficient to require the Supreme Court to determine whether there is an absence of evidence in support of the verdict as a whole or of some fact essential to the existence of the crime charged. *pp. 302, 303.*



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**ARSON.—Evidence.—Sufficiency.—Corpus Delicti.**—In a prosecution for attempted arson the evidence showed that an empty cigar box with a hole in the top, smoke and grease marked, as if it had served to hold a burning candle, was found lying on the ground under the edge of a frame house. There were no smoke or heat marks on the house, nor other unusual combustible material present. There was evidence that a cigar dealer gave accused a cigar box similar to the one found, but it was not established whether it was before or after the box was found under the house. The accused was on unfriendly terms with the son of the owner and occupant of the house, but it was not shown that he knew that the son lived in the house with his father, or that he had a father living. *Held*, that the evidence was not sufficient to support a conviction. *pp. 301-305.*

From Clark Circuit Court; *James K. Marsh*, Judge.

William Chapman was convicted of an attempt to commit arson, and appeals. *Reversed.*

*L. A. Douglass* and *H. W. Phipps*, for appellant.

*W. L. Taylor*, Attorney-General, *C. C. Hadley*, *Merrill Moores* and *F. M. Mayfield*, for State.

**HADLEY, J.**—Appellant was convicted by a jury upon an information charging him with an attempt to commit arson. His motion for a new trial was overruled and he appeals. The overruling of his motion for a new trial is assigned as error. As a ground for a new trial it is alleged that the verdict is contrary to law. Under the assignment it is argued that there was no evidence to sustain the verdict, and hence the verdict is contrary to law.

The uncontroverted and only material facts are these: William Routh, an old man, owns a house in the city of Jeffersonville, of the value of \$800, and resides therein with his wife and son, Edward, who is an unmarried man of mature years. The house is frame, and the bottom is six or seven inches above the ground. About May 10, 1900, William Routh went out of his house between seven and eight o'clock in the morning, and found an empty cigar box on the ground under the edge of his house. The box was of usual form, and of a size to hold 100 cigars, and was

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branded "National Five." "The top had a hole cut in it, and it was smoked black, and pretty nearly burned, and looked like a candle had been in it and burned out." "There was some substance in the bottom of the box that looked like candle grease, but there was no candle or anything else in it." There were no smoke or heat marks on the house, nor other unusual combustible material present. William Routh knew the defendant, who lived near Jeffersonville, only by sight, and never had any dealings or words with him. The chief of police without Routh's invitation called at the house on the 12th of May, which was two or three days after the box was found, and got it; on the 14th or 15th of May a cigar dealer gave the defendant an empty cigar box similar to the one found by William Routh, except that it had no hole in the lid, nor smoke and grease marks upon it. He could not identify the box as the one he had given the defendant, but the general characteristics were the same; the defendant four or five years before had assaulted Edward Routh at a time when the latter was accompanying the former's divorced wife, and had subsequently attempted to stop him, or speak to him, and a bad feeling existed between them. The defendant denied having obtained a cigar box of that size from the dealer, denied having placed a box of any kind on the premises of William Routh, and denied knowing where Edward Routh lived, or that he had a father. Witnesses both sustained and assailed the defendant's character.

The Attorney-General submits that while the sufficiency of the evidence to sustain the defendant's conviction is weak, this court has no power to give him relief under his assignment of error, as such action will require us to weigh the evidence, which we have no authority to do.

Section 1911 Burns 1901, prescribing the grounds for a motion for a new trial in criminal causes, in part reads: "Ninth. When the verdict of the jury or the finding of the court is contrary to law or the evidence." The technical

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distinction between a verdict that is contrary to law and one that is contrary to the evidence has never been clearly drawn, nor do we deem it necessary to attempt to define it here. The verdict under consideration is contrary to law, or we have no question before us. It seems clear to us that a verdict is contrary to law when it appears to have been reached by processes denied by the law. Therefore a verdict unsupported by any evidence is contrary to law. And a verdict without any evidence in support of some fact essential to the existence of the crime charged is equally contrary to law. A more restricted interpretation would render the statute meaningless. In such cases we are not called upon to weigh the evidence, but only to determine where there is an absence of evidence in support of the verdict as a whole, or of some material fact. *Lee v. State*, 156 Ind. 541, 545.

The assignment of error is therefore sufficient to require us to determine whether the record brings the case within this principle. *White v. State*, 136 Ind. 308, 312; *Stout v. State*, 78 Ind. 492.

Recurring to the evidence, the weakness conceded by the Attorney-General is apparent. With respect to the *corpus delicti*, an empty cigar box with a hole in the top, smoke and grease marked, as if at some time it had served to hold a burning candle, found lying on the ground under the edge of a frame house, is the sum total of the evidence upon which the attempted arson rests. This, standing alone, and aided by all legitimate inferences, but feebly tends to prove the existence of a crime; and when associated and viewed with the other uncontroverted and co-existing facts, its probative force vanishes into nothing. The box found was of the usual form, and of a size to hold 100 cigars. From this we know as a matter of common knowledge that the box was about four inches deep, and when placed on the ground under the house its top was within two or three inches of the frame of the house. We likewise

know that a lighted candle from one to two inches long, or long enough to make it possible for the blaze to reach the wood, burning on the top of the box under the house, until every fragment of the candle was consumed, would scorch or smoke the house, if not fire it. The absence of any part of the wick, and of any unmelted part of the body of the candle, from both the hole and bottom of the box, and of all smoke and fire marks from the house, is evidence of the highest character that no candle burned out from the top of the box at that time and place; and if the empty box, without lighted candle, or other means of combustion, was placed under the house, even with design, it is irrational to believe that it was done with intent to set it on fire. Incredulity is further strengthened by the fact that there was no other combustible material present, and no other means, or evidence of other means, to ignite the house. These facts taken together, rather than justify inference of attempted arson, forcibly repel any such inference.

Without any evidence worthy to be classed as such that the crime was committed, it would seem to be supererogation to pursue the discussion further. We deem it proper, however, to add that as the record presents the case to us there was no sufficient evidence of motive, or of incriminating circumstance. As to motive, nothing is shown to create in the defendant a reason, or desire, to injure William Routh, the owner of the house. The two were not acquainted, and had had neither dealings nor words with each other. The defendant did not reside in Jeffersonville. Edward Routh, whom the defendant assaulted years before, and with whom he was not on friendly terms, was a man of mature years, and there was absolutely no evidence or fact from which it might be inferred that the defendant knew where Edward lived, or that he lived with his father. The only fact attempted to be established, besides the motive, as tending to prove the defendant's guilt, was that a dealer in cigars gave to the defendant the empty box found by Wil-

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liam Routh under his house. And this attempt fell far short of being successful. According to the positive testimony of the chief of police, a witness on behalf of the State, he procured the box of William Routh on the 12th day of May, 1900, which was two or three days after it had been found by Routh under his house. The testimony of the dealer, another witness for the State, was that on the 14th or 15th day of May he gave a similar box to the defendant. Taking these dates as fixed by the witnesses, and the testimony of the dealer is both worthless and incompetent. There may have been a mistake by one or the other; but who made it? And what was it? Without evidence we have no right to change either as given by the witnesses; neither had the jury. The duty rested with the State to establish by evidence the true date consistently with its theory of the defendant's guilt before asking the court or jury to consider the giving of the box as a circumstance in the case.

We are unable to view the conviction of the defendant as having been reached by a due administration of the law. The judgment is therefore reversed, with instructions to grant the defendant a new trial. The clerk will issue the proper notice for a return of the prisoner.

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 RUSSELL v. THE PITTSBURGH, CINCINNATI, CHICAGO  
AND ST. LOUIS RAILWAY COMPANY.

[No. 19,598. Filed October 25, 1901.]

**CARRIERS.—Contracts.—Release from Liability for Injuries to Sleeping Car Employees.**—A contract entered into between a sleeping car company and a porter in charge of one of its cars releasing transportation companies over whose lines the coaches of the sleeping car company were being run from all claims for liability of any nature or character on account of any personal injury or death while traveling over such lines in said employment and service, is valid, and inures to the benefit of a railway company transporting the coach in which the porter was injured. *pp. 306-320.*

157	305
157	617
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167	601
157	305
170	103

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**CARRIERS.—Contracts.—Exemption from Liability for Negligence.**—A contract entered into by a sleeping car employe releasing transportation companies "from all claims for liability of any nature or character whatsoever on account of any personal injury or death" includes injuries resulting from the negligence of a transportation company. . p. 318.

From Marion Superior Court; *Vinson Carter*, Judge.

Action by Ambrose Russell against the Pittsburgh, etc., R. Co., for an injury sustained while acting as a porter on a Pullman sleeping car attached to defendant's train. From a judgment for defendant, plaintiff appeals. *Affirmed*.

*A. C. Ayres, A. Q. Jones and J. E. Hollett*, for appellant.  
*S. O. Pickens and F. C. Olive*, for appellee.

DOWLING, J.—This was an action by the appellant, Ambrose Russell, against the appellee, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, for an injury sustained by appellant while acting as a porter upon a Pullman sleeping car attached to appellee's passenger train. The complaint alleged that on the 21st day of August, 1898, appellee operated a railway line through this State; that near the town of Cementville, Indiana, a side-track ran parallel to, and a few feet from, the side of the main track of appellee's line, and was used by the appellee in switching and operating cars; that on the said date appellant was employed as a porter on a Pullman coach attached to and constituting a part of a certain passenger train operated by the appellee; that as said passenger train was moving rapidly over the main tracks near the town of Cementville, and passing by another train of the appellee upon the side-track, the appellant, who was at the time seated near a window of the Pullman coach, was suddenly struck by a door or other obstacle which the appellee had carelessly allowed to project from the train of cars upon the side-track, or from its right of way at that point; that the said projection entered the window of the car in which the appellant was seated, and struck him upon the arm and

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elbow, breaking and crushing them, whereby they were rendered stiff, sore, and permanently disabled. The complaint denies negligence on the part of the plaintiff, and avers that the accident was occasioned wholly by reason of the negligence of the appellee.

To the complaint, the appellee filed answers in three paragraphs, the first being a general denial, which was afterwards withdrawn. The second paragraph alleged that a written contract had been entered into between the appellee and the Pullman Palace Car Company, by which the latter company agreed to furnish sleeping cars to be used for the transportation of passengers over the road of appellee; that said Pullman Car Company was, by said agreement, entitled to and did collect revenue from all passengers using its cars; that it furnished one or more employes upon each of such cars, who were, by the said contract, carried free of charge over the road of the appellee. It was further stipulated in said agreement that, in the event of any liability arising against the said railroad company, over whose railroad said cars were to be run, for personal injury, death, or otherwise, of any employe of said Pullman Palace Car Company, the said railroad company should be indemnified for said liability, and the same paid by said Pullman Palace Car Company. The answer then alleged that the appellant, at the time of the accident, was an employe of the Pullman Company, in charge of one of that company's sleeping cars, and was being hauled in said car in compliance with the contract above referred to; that he had neither paid, tendered, nor agreed to pay, any fare for his passage; that he had, prior to the injury complained of, agreed in writing with said Pullman Company as follows: "Fourth: In consideration of said employment and wages, I undertake and bind myself to assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby for myself, my heirs, executors, administrators, or legal representatives, forever

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release, acquit and discharge said Pullman Palace Car Company, its assigns and legal representatives, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment and service. Fifth: I undertake and bind myself to obey all rules and regulations of the transportation companies made for the government of their own employes, over whose lines the cars of said Pullman Palace Car Company may operate, while I am traveling over said lines in the employment and service of said Pullman Palace Car Company; and, in consideration of said employment and wages, I hereby for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit and discharge any and all such transportation companies from all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me, while traveling over such lines, in said employment and service." The answer alleges that both of these agreements were in force at the time of the accident.

The third paragraph of answer states substantially the same facts as the second, except that no mention is made of the written contract between the appellee and the Pullman Company for indemnity by the latter for liabilities for the injury or death of its employes.

To these two paragraphs of answer the appellant filed separate demurrers upon the ground that neither paragraph stated facts sufficient to constitute a defense to appellant's complaint; which demurrers were overruled and exceptions reserved. On appellant's refusal to plead further, judgment was rendered in favor of the appellee. The appellant assigns for error the overruling of the separate demurrers to the second and third paragraphs of answer. Counsel have discussed both these rulings as involving the same questions, and we shall so treat them.

The principal question here presented is, whether a con-



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tract between a Palace Car Company and a porter having charge of one of its sleeping cars, is invalid in so far as it attempts to exempt transportation companies, over whose lines the coaches of the Palace Car Company are being run, from all liability arising from their negligence and the negligence of their servants; and whether such contract may be pleaded in bar of an action by such porter against a transportation company for an injury caused wholly by the latter's negligence.

The decisions of this State firmly establish that a common carrier of goods or passengers cannot contract with a customer for a release of the carrier from liability resulting from the latter's negligence. *Wright v. Gaff*, 6 Ind. 416; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126; *Insurance Co. v. Lake Erie, etc., R. Co.*, 152 Ind. 333, 335.

The grounds upon which this prohibition rests are variously stated by the court. It has been said that such exemptions are against public policy; that the public is interested in the exercise of care and diligence on the part of the carrier; that it is unreasonable for any person or corporation to contract for the privilege of being negligent, and that the public is concerned with the life and security of every citizen. The fundamental reason, however, for holding common carriers, such as the appellee, liable for the results of their negligence, notwithstanding contracts exempting them therefrom, is that the State has granted them privileges which they exercise for the benefit of the public; in return for these, the common carrier impliedly undertakes to use due care and diligence in the transportation of both goods and passengers. This being a main inducement for the grant of its special rights, the carrier cannot by any special contract rid itself of the burden of responsibility, which is one of the conditions of its creation. Were it permitted to escape liability by entering into exonerating agreements, its position of advantage over

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its patrons would, in almost every instance, enable it to force from them such stipulations as it desired, and the object of the State in creating the carrier would be virtually defeated, the carrier thus being able to abandon the duty imposed upon it by the State. As said in the case of *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126, at page 130: "A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with a passenger, that the latter should take the risk of the negligence of the carrier or of his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence, all stipulations which amount to a denial or repudiation of duties, which are of the very essence of his employment, will be regarded as unreasonable, contrary to public policy, and therefore void."

In *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362, at page 12, the court say: "Carriers, of the class of the plaintiff in error, are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care. This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed, to a very great extent, to the care of public carriers. \* \* \* It cannot be denied that pecuniary liability for negligence promotes care; and if public carriers

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in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence."

Again, in *New York, etc., R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, cited by the appellant, the Supreme Court of the United States say, at page 377: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the security of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms. \* \* \* Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading,

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or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. \* \* \* If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. \* \* \* The proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. \* \* \* The inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

The inquiry remains, is the present contract of exemption invalid as being within the theory of the rule above explained? If it is, it must be by virtue of some positive statute, or because of the fact that it is an abandonment by the carrier of a public duty.

No statute applies, for the recent act of the legislature, Acts 1901, p. 515, which may possibly include similar agreements, was enacted after the present suit was instituted, and expressly excepts pending litigation from its operation.

In determining whether this contract is invalid, we lay out of the case all consideration of the question whether the appellant was being carried gratuitously or for hire. The law is well settled that mere non-payment of fare, or gratuitous carriage, will not of itself deprive a traveler of his right of action for the results of negligence of the carrier. *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471; *Louisville, etc., R.*

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*Co. v. Faylor*, 126 Ind. 126; *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, 18 Am. Rep. 360.

It may be that the appellant should be considered not as a licensee carried gratuitously, but as a person, the compensation for whose carriage was paid by the Pullman Company when it entered into an agreement with the appellee for furnishing employes upon sleeping cars. See *Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 36 Am. St. 550; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Missouri, etc., R. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. 758.

On the other hand, the fact that compensation has been paid by, or on behalf of, one who is being carried on a railway car does not necessarily give him a right of action, even for injuries caused by the carrier's negligence. If his carriage is not in the performance of a duty imposed upon the carrier by law, then it will depend upon the terms of his particular contract with the railroad company whether or not there is any liability. As said in the case of *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, at page 505: "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important functions of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare."

In the case of *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 58 Am. St. 348, the above rule was strictly followed. There, an express messenger in his written contract with the American Express Company agreed to assume all risks of accidents and injuries sustained in the course of his employment, whether occasioned by the negligence of any corporation engaged in operating any

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railroad, or of any employe of such corporation. The only compensation which the railway company was to receive for carrying the express messenger was that paid by the express company to it. The court held that, as railroads are not required by law to accept the traffic of independent express companies, they are not guilty of a departure from their public duty in availing themselves of a contract of exemption from liability for negligence, entered into between the express messenger and his employer, the express company. As stated by the court, page 26: "A common carrier may, however, become a private carrier or bailee for hire, where, as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry." See the cases referred to at length in the course of the opinion.

In the case of *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 62 Am. St. 503, this court again held valid a contract exempting the railroad company from liability for its negligence resulting in the death of an express messenger carried upon its train under a special agreement with the express company. At page 200, the court say: "These authorities probably sustain the proposition stated when applied to exemption against negligence in the discharge of a public or *quasi* public duty, such as that owing by a common carrier to an ordinary shipper, passenger, or servant. In a recent decision of this court, however, that of *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, we recognized the well established rule that railway companies, although public or common carriers, may contract as private carriers, such as that of transporting express matter for express companies, as such matter is usually carried, and in that capacity may properly require exemption from liability for negligence as a condition to the obligation to carry." (Citing cases.)

In the case of *Baltimore, etc., R. Co. v. Voigt*, 173 U. S. 498, arising under a state of facts similar to those in the

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Keefer case, *supra*, the Supreme Court of the United States reversing the judgment of circuit court of appeals for the sixth circuit, and citing and approving the decisions in 146 Ind. 21, and 148 Ind. 196, held the carrier exonerated from all liability to the express messenger, because of a special contract entered into between the latter and the express company. At page 512, the court use the following language: "It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies of any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no local compulsion to enter into."



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This statement of the law is applicable to the present case. The appellant did not occupy the position of an ordinary passenger upon appellee's train. He was not being carried upon any journey from one point to another, nor was his presence incidental to the shipment of goods which the carrier was bound to accept. He occupied the sleeping car as a part of his employment with the Pullman Company. His was not a position of disadvantage with reference to the appellee, rendering it practically impossible for him to reject the terms of limited liability contained in his contract with the Pullman Company. He might have declined to enter into such an employment, and have returned to his usual occupation described in the complaint as that of a stationary engineer and electrician.

In no sense was the appellee bound to accept the appellant upon its trains, solely because he accompanied a palace car tendered by the Pullman Company, for the obvious reason that the carrier was under no legal obligation to accept and haul the sleeping car itself. Counsel for appellant urge the argument that it is customary for sleeping cars to be attached to railway trains, thus affording a great convenience to travelers, and hence the carrier is not proceeding outside of its regular business in accepting such coaches. But counsel fail to distinguish between a departure from the legitimate business of a carrier, and the doing of an act which, though within the general scope of its powers, is not imposed upon it as a duty. It would be no ground for an action of *quo warranto* against a railroad corporation that it has transported circus cars or express cars over its lines, or that a street car company has received for carriage a bag of specie. But no one would seriously contend that these acts are such as the carrier *must* perform. He *may* perform them, but if he refuse, he cannot be proceeded against as for a violation of his common law duty. If he does agree to perform them he may stipulate, specially, how far his liability for negligence shall extend. *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111, 22 N. W. 215,



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56 Am. Rep. 374; *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 31 N. E. 650, 32 Am. St. 482; *Blank v. Illinois, etc., R. Co.*, 182 Ill. 332, 55 N. E. 332.

Counsel for appellant have referred us to no case holding that railroad carriers must receive sleeping cars for transportation over their lines in connection with the railroad passenger trains. The case of *Pullman, etc., Car Co. v. Missouri, etc., R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, assumes that no such duty rests upon the common carrier. The court say, at page 597: "It may be, as is also alleged, that it has 'become indispensable, in the conduct of the business of a railroad company, to run on passenger trains sleeping and drawing-room cars, with the conveniences usually afforded by such cars for night travel,' but it by no means follows that the railway is, in law, obliged to arrange with the Pullman Company for such accommodations. \* \* \* The business is always done under special written contracts. These contracts must necessarily vary, according to the special circumstances of each particular case."

But appellant contends that, inasmuch as appellee was not a party to the contract exempting transportation companies from liability for negligence, it cannot take advantage of its terms. The contract referred generally to transportation companies over whose lines the Pullman Company should run its cars. This comprehended the appellee, and, as the contract was *prima facie* for the benefit of the appellee, it will be presumed to have accepted its provisions, and it may now claim its advantages, as one in whose interest the agreement was executed. There was sufficient privity shown between the appellant and the appellee. *Ransdel v. Moore*, 153 Ind. 393, 405, 407.

We conclude, therefore: (1) That the appellee was under no legal duty to receive either the appellant or the car upon which he rode, since the appellant was not, and did not, purport to be a passenger, but occupied the sleeping car under a special contract between the Pullman Company

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and the appellee; (2) the appellee could, under these circumstances, contract specially for a release from all liability for negligence toward appellant; (3) a contract of release made between the appellant and the Pullman Company inured to the benefit of the appellee, referred to generally therein, and its provisions can be taken advantage of by the latter in this action.

Appellant next argues that, even if a contract for exemption from liability were valid, this particular contract is void, because the word "negligence" is not used in the exonerating clause. The language employed is: "I hereby \* \* \* release, acquit, and discharge any and all such transportation companies from all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me while traveling over such lines, in said employment and service."

This provision is broad enough to include injuries resulting from the negligence of the appellee. As we have said, contracts made under the circumstances of the present case are not void as against public policy, and the same rules of construction should apply to them as to ordinary, valid stipulations. *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196, 203.

In the following cases, the language exempting the company from liability was not so strong as in the contract we are considering, yet it was held to include negligence by necessary implication. *Illinois, etc., R. Co. v. Read*, 37 Ill. 486, 87 Am. Dec. 260; *Bates v. Old Colony R. Co.*, 147 Mass. 255, 17 N. E. 633; *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. 652.

The cases cited by appellant, when carefully examined, are not inconsistent with this interpretation. In *New Jersey, etc., Co. v. Merchants Bank*, 6 How. 344, 12 L. Ed. 465, the provision for exemption was in a shipping contract. Such restrictions being against public policy, as above shown, when found in agreements for the transportation of goods, should be strictly construed.

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In *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 53 Am. Rep. 500, the liability exemption clause was in an abbreviated form and illegible at the time the shipper received the contract; he having neither seen nor understood the abbreviations. It was held there was no exemption from liability for negligence.

The following cases from the New York court of appeals are also relied upon by appellant as establishing the necessity for a rule of strict construction in the case at bar. *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275; *Nicholas v. New York, etc., R. Co.*, 89 N. Y. 370; *Kenney v. New York, etc., R. Co.*, 125 N. Y. 422, 26 N. E. 626.

The law in New York has long been that contracts containing exemptions from liability for negligence are valid, though made with shippers or passengers. As a reaction against a rule which the courts of that state regard as unfortunate, and which does not prevail in Indiana, the counter doctrine has been introduced that, unless liability for negligence is expressly included, it will not be implied. As the rule does not obtain in this State, the cases involving the exception are irrelevant. See *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196, 200, 201.

The learned counsel for appellant cite the case of *Jones v. St. Louis, etc., R. Co.*, 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. 514, which holds that a porter upon a sleeping car is a passenger, entitled to protection from the negligence of the transportation company, and that a contract of release from such liability is no bar to his recovery. It does not appear from the reported decision how the objection to the release arose, and the discussion of the proposition here involved is brief and unsatisfactory. The court assumes that the same rule applies to express messengers, and to sleeping car porters; but, as will be seen from recent

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decisions in this State, such contracts as the present are valid when entered into respecting express agents. We do not regard the case as controlling in its authority and, even were it applicable to the present controversy, we are not inclined to follow it.

There being no error in the action of the lower court in overruling the separate demurrers to the second and third paragraphs of answer, the judgment is affirmed.

## MCGEATH v. STARR.

[No. 19,681. Filed October 25, 1901.]

**WILLS.—Probate.—Contest.—Process.**—The general rule that an action is commenced only when the complaint is filed and process issued thereon, applies to a proceeding to contest the probate of a will, and where, in such proceeding, the persons beneficially interested under the will were not served with notice of such contest, they were entitled to have the will admitted to probate upon proof of the due execution thereof, and the contestant had no right to object. *pp. 320-324.*

**SAME.—Probate.—Separate Contests.—Dismissal.**—A contestant may file objections to the probate of a will during the pendency of objections filed by another party, and the dismissal by the former will not affect the proceedings of the latter. *p. 323.*

From Wells Circuit Court; *E. C. Vaughn*, Judge.

Proceeding by Manford McGeath to contest the probate of the will of Benjamin F. Starr. From a judgment admitting the will to probate, contestant appeals. *Affirmed.*

*G. Mock, J. Mock and L. Mock*, for appellant.

*J. S. Dailey, A. Simmons and F. C. Dailey*, for appellees.

**DOWLING, J.**—On January 25, 1899, and prior to the admission of the supposed will of one Benjamin F. Starr to probate before the clerk of the Wells Circuit Court, in this State, Christopher C. Starr, a son of the decedent, filed his objection thereto in writing, duly verified, and alleging that such objection was not made for vexation or delay. At the succeeding term of the court, which was the February term,

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no further steps were taken, and the matter was continued to the April term, when two of the beneficiaries under the will filed an answer in denial.

On April 26, 1899, being the 9th day of the April term of the said court, the appellant, Manford McGeath, filed in court his objection to the probate of the said will, which was in due form, setting forth the unsoundness of the mind of the testator, and charging that said will was unduly executed. The complaint further alleged that the decedent left surviving him his children, Mary Lancaster, Benjamin F. Starr, Christopher C. Starr, Matilda J. McGeath, and his grandchildren, Mary J. McGeath, Benjamin Foreman, and the appellant, Manford McGeath, as his only heirs at law. The complaint also alleged that the decedent, by the supposed will, assumed to dispose of his estate by devising to Mary Lancaster, Benjamin F. Starr, Matilda J. McGeath, each one-fifth part thereof, and that these persons were the only beneficiaries named in the will. No executor was mentioned in the complaint.

On May 20, 1899, being the thirtieth day of the April term, the objections to the probate of the will filed by Christopher C. Starr, in vacation, were dismissed by him.

Nothing further seems to have been done in the matter of the complaint of the appellant, Manford McGeath, until November 21, 1899, being the 2nd day of the November term, when Matilda J. McGeath entered her special appearance, and moved to dismiss the proceeding of the appellant, but no action was taken upon this motion. No citation was issued for the beneficiaries and defendants named in the will and complaint, nor were any other steps taken to bring any of the defendants into court.

On November 22, 1899, being the third day of the November term, Matilda J. McGeath, one of the devisees named in the will, moved the court to admit the will of the said Benjamin F. Starr to probate, and, thereupon, the court heard the evidence as to the execution of the said will.

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December 4, 1899, being the thirteenth day of the said November term, the appellant filed his motion to withdraw the submission of the cause for trial, and to reject the evidence of the execution of the will, for the reasons that no day had been fixed for the trial of said cause, and that the evidence was heard in the absence and without the knowledge of the appellant or his attorneys. The motion was overruled, and the appellant then moved, in writing, that a day be fixed by the court for the trial of the cause to enable him to produce his evidence. His request was denied. Exceptions were taken by the appellant, and were properly reserved by bill. The court then made an order that the will of the said Benjamin F. Starr be, and that the same was, admitted to probate.

The errors assigned are (1) and (2) that the court heard the evidence relative to the execution of the will, and admitted the will to probate, in the absence of the appellant and his attorneys, and without their knowledge or consent, and without having fixed a day for the trial of the cause; (3) that the court overruled the appellant's motion to set aside the submission of said cause for trial, and to strike out the evidence; and (4) that the court overruled appellant's motion to fix a time for the trial of said cause to enable appellant to produce his witnesses.

Under these several assignments, the counsel for appellant contend that he was not allowed his day in court, and that he was deprived of his property in said estate without due process of law, in violation of the provisions of the fourteenth amendment of the Constitution of the United States.

Proceedings under §2766 Burns 1901 differ in several particulars from those authorized by §2765 Burns 1901. Under the former section, any person interested in the estate of a decedent may resist the probate of his will any time within three years after the same has been offered for

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probate, by filing in the proper county his allegation or complaint in writing, verified by his affidavit, setting forth some statutory ground of objection to the probate. All persons beneficially interested under the will must be made defendants in such proceeding. When the complaint is filed in the circuit court before the probate of the will, no bond is required from the persons resisting the probate. A citation must be served upon the defendants fourteen days before the hearing of the cause, or if they or any of them are non-residents, notice must be given to such non-residents by publication. The circumstance that one person has filed objections to the probate with the clerk in vacation does not prevent another from resisting the probate of the same will by filing his complaint in the circuit court at any time before the will is established. The procedure as to notice to the parties when the probate is resisted by complaint filed in the circuit court is the same in all respects as upon the contest of a will after probate.

The appellant had the right to file his complaint at the time and in the manner shown by the record, and the pendency of the objections lodged with the clerk in vacation by Christopher C. Starr did not affect such right of action. Neither did the dismissal of Christopher C. Starr's objections interrupt the proceedings of the appellant.

But the appellant made one fatal omission. He failed to take any steps to bring the defendants, who were the beneficiaries under the will, and its executor, into court. The mere filing of his complaint was not notice to them. The general rule that an action is commenced only when the complaint is filed, and process is issued thereon, applies to proceedings of this kind as well as to ordinary civil actions. §316 Burns 1901; *Temple v. Irvin*, 34 Ind. 412; *Alexandria, etc., Co. v. Irish*, 152 Ind. 535.

As no process was issued, and none of the defendants named in the complaint was brought before the court, the persons beneficially interested under the will, and the execu-

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tor, were entitled to have the proof of the due execution of the will heard at any time while the court was in session. By simply filing his complaint, the appellant could not arrest the proving of the will, and such filing, without the issuing of a citation, or the publication of notice to the beneficiaries under the will, gave him no standing in court. When the will was presented for probate, and a party interested offered evidence of its due execution, the court could not refuse to hear the proof, but its duty was to proceed with the hearing, and to determine such cause. §2768 Burns 1901.

If the appellant had been present in court, he would have had no right to object to the hearing for the reason that his failure to bring the defendants named in his complaint before the court left him without standing there. For the same reason, the appellant had no right after the hearing to demand that the submission of the cause be set aside, and that a day be fixed by the court for another hearing.

The appellant has in no sense been deprived of his day in court, nor has there been here any taking of property without due process of law. Besides, the order establishing the will is not conclusive as yet, but may be vacated in a proceeding to contest the will, and the appellant may, if he chooses to do so, avail himself of that privilege.

There is no error. Judgment affirmed.

### THE STATE v. BAILEY.

[No. 19,870. Filed October 29, 1901.]

SCHOOLS.—*Compulsory Education.—Truancy.—Constitutional Law.*

—*Statutes.*—The title of the act of 1899 (Acts 1899, p. 547), "An act entitled an act amending an act concerning the education of children, approved March 8, 1897, and declaring an emergency," the act defining the duties of parents and guardians concerning the attendance of children at school, providing for the appointment of a truant officer and the definition of a misdemeanor, is not violative of the provision of §19, article 4 of the Constitution, that the subject of an act shall be expressed in the title. pp. 326-329.

157	324
161	258
161	490

157	324
170	450



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SCHOOLS.—*Compulsory Education.—Truancy.—Constitutional Law.*

—*Statutes.*—The act of 1899 (Acts 1899, p. 547), entitled "An act entitled an act amending an act concerning the education of children, approved March 8, 1897, and declaring an emergency," indicates with sufficient precision, within the meaning of §21, article 4 of the Constitution, that it is an amendment of the act of March 8, 1897, concerning the education of children. *p. 329.*

SAME.—*Compulsory Education.*—The act of 1899 (Acts 1899, p. 547), requiring every parent, guardian or other person within the State having control or charge of any child or children between the ages of six and fourteen years to send such child or children to school each year for a period not less than that of the public schools of the school corporation where the child or children reside, is not an unauthorized invasion of the natural right of the parent to the custody and control of his child. *pp. 329, 330.*

SAME.—*Criminal Law.—Affidavit.—Compulsory Education.*—An affidavit charging defendant with having neglected, omitted and refused to send his child to school, in violation of the compulsory education law (Acts 1899, p. 547), is not defective because the word "unlawful" was not used therein, where the facts averred sufficiently show that the act of defendant was unlawful. *p. 331.*

From Jay Circuit Court; *J. M. Smith*, Judge.

Sheridan Bailey was convicted before a justice of the peace for violation of the compulsory education law. From a judgment of the circuit court quashing the affidavit, the State appeals. *Reversed.*

*W. L. Taylor*, Attorney-General, *C. C. Hadley*, *Merrill Moores*, *D. E. Griner* and *Rowland Evans*, for State.

*F. H. Snyder* and *G. W. Bergman*, for appellee.

DOWLING, J.—The appellee was charged upon affidavit before a justice of the peace with having neglected, omitted and refused to send his child, Vory Bailey, to school, in violation of the provisions of the compulsory education law of this State, of March 8, 1897 (Acts 1897, p. 248), as amended by the act of March 6, 1899 (Acts 1899, p. 547). He was convicted before the justice, and, upon an appeal from that judgment to the circuit court, the affidavit was quashed. The State appeals. . . .

The constitutionality of the act of March 6, 1899, is

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assailed by the appellee upon the following grounds: (1) Because it is in conflict with §19, article 4, of the Constitution of Indiana; (2) because it is in conflict with §21, article 4, of the Constitution; (3) because it invades the natural right of man to govern and control his own children.

The additional point is made by counsel for the appellee that the facts stated in the affidavit are not sufficient to constitute a public offense.

The title of the act of March 6, 1899, is: "An act entitled an act amending an act concerning the education of children, approved March 8, 1897, and declaring an emergency." It is contended that this title does not conform to that provision of the Constitution which prescribes that every act shall embrace but one subject, and matters properly connected therewith, and that such subject shall be expressed in the title. It is also objected that the title of the act is so vague and uncertain as to render it nugatory. It is said that the subject of the act is declared to be the education of children, but that the provisions of the statute relate to subjects of an entirely different nature, such as the duties of parents and guardians concerning the attendance of children at school, the creation of an office, the appointment of a truant officer, and the definition of a misdemeanor.

The law of the case seems to be well settled by the decisions of this court. Such a title as "An act to promote the general welfare of the State;" or "an act to promote good morals," would give no indication of the character of the subject of the statute, and, therefore, would fail to meet the requirement that the subject of the act must be expressed in the title. *Indiana, etc., R. Co. v. Potts*, 7 Ind. 681; *Gillispie v. State*, 9 Ind. 380; *Henderson v. London, etc., Ins. Co.*, 135 Ind. 23, 20 L. R. A. 827, 41 Am. St. 410; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313; *Bright v. McCullough*, 27 Ind. 223.

But the title, "An act concerning drainage", properly em-

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braces legislation authorizing the appointment of a board of drainage commissioners. It is sufficient also to include provisions for the making and collecting of assessments upon the lands benefited by the work, and the recovery of attorney's fees. *Ross v. Davis*, 97 Ind. 79; *Wishmier v. State*, 97 Ind. 160.

The title, "An act to regulate the sale of intoxicating liquors", was held a sufficient expression of the subject of the act, and to authorize provisions prohibiting the sale of liquor, and imposing penalties for violation of the statute. *Williams v. State*, 48 Ind. 306; *Kane v. State*, 78 Ind. 103.

"An act defining felonies, and prescribing punishment therefor", and "An act defining certain felonies, and prescribing punishment therefor", were held sufficiently certain to embrace all felonies mentioned in them with the punishments for the same. *Peachee v. State*, 63 Ind. 399.

The title of a statute was: "An act to provide for the incorporation of railroad companies"; held a sufficient statement of the subject to embrace a provision for the individual liability of the stockholders. *Shipley v. City of Terre Haute*, 74 Ind. 297.

"An act concerning bank officers, brokers, *etc.*, receiving deposits after insolvency, repealing all laws in conflict herewith" was decided to be "comprehensive enough, omitting the '*etc.*' to express the subject of the act." *State v. Arnold*, 140 Ind. 628.

*Bright v. McCullough*, 27 Ind. 223, contains a luminous and forcible explanation of the meaning of §19 of article 4 of the Constitution: "The Constitution does not assume to divide the general scope of legislation, and classify the parts under particular heads or subjects, but, of necessity, has left that power to be exercised by the legislature, as it, in its wisdom and discretion, shall deem proper. The Constitution assumes that different subjects of legislation do exist, and requires that each act shall embrace but one subject, and matters properly connected therewith, which sub-

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ject shall be expressed in the title. The purposes of the provision, in view of the evils intended to be guarded against, can only be effected by requiring that the subject expressed should be reasonably specific, or, in other words, should be such as to indicate some particular branch of legislation, as a head under which the particular provisions of the act might reasonably be looked for. With this restriction, the subject of an act may be enlarged or restricted at the will of the legislature, and the subject must be determined by reference to the language used in the title. It sometimes occurs that the draughtsman, intending to provide a title sufficiently comprehensive to cover various provisions, all, however, relating to a common subject, instead of selecting a subject which is sufficiently comprehensive to embrace all the provisions of the act, and expressing it in general terms, attempts to accomplish the desired object by stating in the title, in detail, the character or purpose of the various provisions of sections, thereby often limiting the subject expressed to the particular matters thus specified. But it should be borne in mind that the Constitution only requires that a proper subject of legislation should be expressed in the title, and not the particular features or details of the law. If these relate to the subject expressed, it satisfies the constitutional provisions. The words, 'an act concerning highways,' would express but a single subject, and yet would constitute a comprehensive title, under which almost any desired provision relating to highways might be enacted, and every effort to express in the title the details of the act would only tend to limit the subject." See, also, *Gustavel v. State*, 153 Ind. 613; *Maule Coal Co. v. Partenheimer*, 155 Ind. 100; *Clarke v. Darr*, 156 Ind. 692.

We think the title of the statute in question specific enough to guard against the evils intended to be prevented by the Constitution. It sufficiently indicates "some particular branch of legislation as a head under which the particular provisions of the act might reasonably be looked

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for.” The subject of the act, as expressed in the title, is “the education of children.” Is this any less specific than “drainage”, or, “highways”? Is it not as definite as “to regulate the sale of intoxicating liquors” or, “to provide for the organization of railroad companies”? Yet, each of these has been held a sufficient statement of the subject of the act to which it applied.

The validity of the act of March 6, 1899, is denied, also, because of its supposed conflict with §21 of article 4 of the Constitution, upon the ground that its title does not refer to the title of the act of March 8, 1897, which it purports to amend. The grammatical construction of the title is awkward, and inaccurate, but it indicates with sufficient precision that the act of 1899 is an amendment of “An act concerning the education of children,” which was the full title of the act of March 8, 1897. And the statute amended is further identified by reference to the date of its approval. The rule in such cases is that an act of the legislature is not to be held void because of trivial and unimportant defects in its title. If any reference to the title of the act amended was necessary—as was held in *Feibleman v. State*, 98 Ind. 516—this requirement was sufficiently complied with in the title of the amendatory act of 1899.

The next question presented is, whether the statute is an unauthorized invasion of the natural rights of the appellee as a parent.)

The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the State, and may be restricted and regulated by municipal laws. One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth. If he neglects to perform it, or wilfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child, and the best interests of society require that the State shall exert its sovereign authority to secure

to the child the opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods, during certain years of the life of such children, have not only been upheld as strictly within the constitutional power of the legislature, but have generally been regarded as necessary to carry out the express purposes of the Constitution itself. [§§1-8, article 8, Constitution of Indiana; Hocheimer Custody of Infants, §79; Fraser's Law of Parent and Child, 77; *Bennett v. Bennett*, 13 N. J. Eq. 114; *English v. English*, 32 N. J. Eq. 738; *Matter of Bort*, 25 Kan. 308, 37 Am. Rep. 255; *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. 788; *Sheers v. Stein*, 75 Wis. 44, 43 N. W. 728, 5 L. R. A. 781; *Lally v. Henry*, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681.]

"The matter of education is deemed a legitimate function of the State, and with us is imposed upon the legislature as a duty by imperative provisions of the Constitution. \* \* \* The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province which by the Constitution is assigned exclusively to the law-making power." *State v. Clottu*, 33 Ind. 409, 411.

To carry out the enlightened and comprehensive system of education enjoined by the Constitution of this State, a vast fund, dedicated exclusively to this purpose, has been set apart. Revenues to the amount of more than \$2,000,000 annually are distributed among the school corporations of the State. No parent can be said to have the right to deprive his child of the advantages so provided, and to defeat the purpose of such munificent appropriations. . . .

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[In the last place, it is objected that the affidavit is insufficient because it does not allege that the appellee "unlawfully" neglected, etc., to send his child to school. The facts averred sufficiently show that the act of the appellee was unlawful. All of the exceptions and legal excuses named in the statute are negatived in the affidavit, and the conduct of the appellee, as described in that instrument, could not have been lawful. The rule applicable here is well stated in Wharton's Crim. Pl. & Pr. (8th ed.) §269, as follows: "The phrase 'unlawful' is in no case essential, unless it be a part of the description of the offense as defined by some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful; if the fact stated be legal, the word unlawful cannot render it indictable."

The affidavit sufficiently charged a public offense.]

For the error of the court in sustaining the appellee's motion to quash the affidavit, the judgment is reversed. ♪

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**RALYA, ADMINISTRATOR OF THE ESTATE OF RALYA,  
DECEASED, v. E. C. ATKINS & COMPANY.**

[No. 19,100. Filed October 30, 1901.]

**CONTRACTS.—Construction by Parties.—Patents.—Royalties.**—Where a complaint in an action to recover royalty for an improvement sets out a written contract clear and unambiguous in its terms describing the patent by name and number, it was not error to strike out an allegation seeking to embrace therein a second patent, which was not issued until about a year after the contract was entered into, on the theory that by a common understanding and mutual consent the contract was construed and acted upon as embracing subsequent improvements, there being no averment of mutual mistake, nor reformation of the contract sought. *pp. 332-337.*

**PLEADING.—Answer.—Surplusage.**—Paragraphs of answer, good as general denials, not purporting to be pleas in confession and avoidance, are not rendered bad by immaterial matter alleged therein. *p. 337.*

**CONTRACTS.—Rescission.**—When a party, even without right, claims to rescind a contract, if the other party agrees to the rescission, or

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does not object thereto, and permits it to be rescinded, the rescission is by mutual consent. pp. 337, 338.

**PLEADING.—Harmless Error.**—Available error can not be predicated upon the action of the court in overruling a demurrer to an answer where the record shows that at the close of the plaintiff's evidence in chief the jury, by direction of the court, returned a verdict for defendant. pp. 338, 339.

**EVIDENCE.—Contracts.—Letters Written in Negotiations.—Merger.**—Letters written in the negotiation of a contract are merged in the written contract and are not admissible in evidence in an action on the contract. pp. 339, 340.

**SAME.—Patents.—Royalties.—Contracts.**—In an action on a contract to recover royalty on a patent specifically described by name and number, a second patent not referred to in the contract was not admissible in evidence. p. 340.

**APPEAL AND ERROR.—Presumptions.**—Where it is not shown that all of the evidence is in the record it will be presumed on appeal that other evidence was given which justified the court in directing a verdict for defendant. p. 341.

From Marion Superior Court; *J. M. Leathers*, Judge.

Action by William S. Ralya, administrator, against E. C. Atkins & Co., to recover royalty on a patent. From a judgment for defendants, plaintiff appeals. *Affirmed*.

*E. P. Ferris, W. W. Spencer, S. Mott and F. W. Ballengher*, for appellant.

*F. Winter and C. Winter*, for appellee.

**MONKS, C. J.**—This action was brought by appellant upon a written contract to recover royalty for an improvement in cross-cut saws manufactured and sold by appellee under a patent. A trial of the cause resulted in a verdict for appellee by direction of the court.

The complaint is in two paragraphs. The first error assigned calls in question the action of the court in sustaining a motion to strike out parts of the first paragraph of complaint. The written contract upon which the action was brought was executed May 6, 1887, by appellant's decedent, John J. Ralya, as the party of the second part, and appellee as party of the first part, and provided "that



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whereas the party of the second part had applied for letters patent of the United States for improvements in cross-cut saws, which said application in the notice serial number 208,440 of allowance of same gives date of filing said application as July 9, 1886. Now, therefore, for and in consideration of the sum of \$20 to him in hand paid by said party of the first part, the receipt of which is hereby acknowledged, and certain other valuable considerations hereinafter mentioned, the party of the second part has bargained, sold, transferred, and conveyed, and by these presents does bargain, sell, transfer, and convey unto the said party of the first part the sole and exclusive right to make, vend, and use any and all improvements made by him in the construction of cross-cut saws, and for which letters patent may be granted to him by the United States as herein mentioned, and upon the terms and considerations hereinafter stated. The said party of the first part agrees to use reasonable diligence to manufacture and sell cross-cut saws made under said letters patent and to pay said party of the second part five cents per lineal foot royalty on all saws made by them under said letters patent and according to the original design and pattern of said party of the second part." It is provided that a statement shall be rendered of all sales of saws made "under said letters patent and design" at stated times, and that Ralya shall pay for all saws he may require "under said letters patent and design." It is further provided that said saws shall be known as the "Cyclone" and the party of the first part is to have the sole and exclusive right to the use of said name and shall etch or brand the same upon the blades. It is also provided that Ralya "shall protect his patent from infringement and that nothing in this contract shall be construed to waive any right of manufacture now practiced or used by said party of the first part without payment of royalty."

The parts of the first paragraph of the complaint stricken out relate to a patent dated April 24, 1888, number 381,-

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814, while the patent described in the written contract was dated May 31, 1887, and numbered 364,131. By the allegations stricken out, appellant sought to have said contract made to embrace the second patent, which was not issued until about a year after the contract was entered into and the saws made under which were named "Volcano."

There is no ambiguity in the terms of the contract. It refers exclusively to the patent for which application was then pending, which is described by the number and date of the application, and which patent when issued was dated May 31, 1887, and numbered 364,131. This is the patent which is referred to in the contract as "said letters patent" and "said letters patent and design." No reference is made in the contract to any other patent. Nothing in the contract gave appellee any right under any other patent than the one numbered 364,131 and appellee had no right or claim to any other patent under said contract. It is not averred that there was any mutual mistake in the contract, nor is any reformation thereof asked for. There is no express allegation that the contract was even modified subsequently, in writing or orally, so as to embrace the second patent, but only that "by a common understanding and mutual consent the contract was construed and acted upon as covering and embracing all improvements made by John J. Ralya in the construction of cross-cut saws; and all rights, privileges, and benefits conferred by the second patent above mentioned inured by force and effect of said contract as construed by the parties thereto, to the sole and exclusive use of the defendant upon the terms and conditions of those of the original patent number 364,131; that the principles and devices of both patents were thereafter treated as being embraced in and covered by the terms of said contract, all of which was done under and by virtue of the construction of said contract placed thereon by the parties thereto while disclaiming any purpose of changing the terms and conditions thereof. That said John J. Ralya and

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said defendant, by common consent, entered upon the discharge of their respective undertakings, in pursuance of said contract as construed by them, and continually from August 24, 1887, to the commencement of this suit, treated all improvements in cross-cut saws made by said John J. Ralya, whether embraced in said patents or not, as the property of the defendant, and said defendant has manufactured and sold certain cross-cut saws embodying the devices covered by both patents, and has by mutual consent given such saws the name of 'Volcano.' "

These allegations cannot enlarge or change the construction of the written agreement. Whether said allegations are sufficient to show an oral modification of the written contract, or an implied or express contract in regard to the improvements in cross-cut saws covered by the second patent, we need not and do not decide, for the reason that such is not the theory of this paragraph, such purpose being expressly disclaimed therein. This action is founded on the contract in writing executed by the parties, and it is sought to enforce the same as executed, not as modified by any oral agreement, or otherwise. It is true that when the terms of a contract are of doubtful or ambiguous meaning, the construction placed on the same by the parties, by their conduct and acts, may be shown for the purpose of arriving at their true intention. The construction placed on such a contract by the parties is entitled to great weight and may be controlling. 17 Am. & Eng. Ency. of Law (2nd ed.) 23-25; Bishop on Cont. (Enlarged ed.) §412; 1 Beach on Contracts, §§721, 722; Clark on Contracts, p. 594; *Newpoint Lodge, etc., v. Town of Newpoint*, 138 Ind. 141, 146; *City of Vincennes v. Citizens, etc., Co.*, 132 Ind. 114, 124, 16 L. R. A. 485; *Louisville, etc., R. Co. v. Reynolds*, 118 Ind. 170, 173; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 212, 51 Am. Rep. 749; *Vinton v. Baldwin*, 95 Ind. 433, 436; *Reissner v. Oxley*, 80 Ind. 580, 584; *Johnson v. Gibson*, 78 Ind. 282, 284; *Aimen v. Hardin*, 60 Ind. 119, 122;

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*Morris v. Thomas*, 57 Ind. 316, 322; *North Chicago, etc., R. Co. v. Sheldon*, 9 Wall. 50, 54, 19 L. Ed. 594; *Smith v. Board, etc.*, 6 Ind. App. 153, 159.

When, however, the contract is free from ambiguity and its meaning is clear, such rule is not applicable. 17 Am. & Eng. Ency. of Law (2nd ed.) 24, 25; 1 Beach on Cont., §722; Clark on Cont. p. 594; *Morris v. Thomas*, 57 Ind. 316, 322; *Newpoint Lodge, etc., v. Town of Newpoint*, 138 Ind. 139, 146; *Philadelphia, etc., R. Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Davis v. Shafer*, 50 Fed. 764, 767, 768; *Spencer v. Millisack*, 52 Iowa 31, 2 N. W. 606; *Citizens Ins. Co. v. Doll*, 35 Md. 89, 107, 6 Am. Rep. 360, 369, 370; *St. Paul, etc., R. Co. v. Blackmar*, 44 Minn. 514, 518, 47 N. W. 172; *Rogers v. Colt*, 21 N. J. L. 704, 708, 712; *Stewart v. Lehigh Valley R. Co.*, 37 N.J.L. 53; *Baring v. Waterbury*, 10 N. Y. (App. Div.) 1, 7, 8, 41 N. Y. Supp. 612; *Hill v. Priestly*, 52 N. Y. 635, 636; *Garard v. Monongahela College*, 114 Pa. St. 337, 339, 340, 6 Atl. 701; *Arnold v. Farr*, 61 Vt. 444, 447, 448, 17 Atl. 1004; *Holston, etc., Co. v. Campbell*, 89 Va. 396, 397-400, 16 S. E. 274; *Davis v. Sexton*, 35 Ill. App. 407, 409, 410; *Smith Drug Co. v. Saunders*, 70 Mo. App. 221, 226, 227; *City of Cincinnati v. Gas Light, etc., Co.*, 53 Ohio St. 278, 285-288, 41 N. E. 239. In *Morris v. Thomas*, *supra*, p. 322, this court said: "If there was any obscurity, uncertainty or ambiguity in the terms of this contract, then the acts of the parties in connection therewith, as suggested by appellant's counsel would furnish valuable aid in the construction of the contract. But where, as in this case, the terms of the contract are plain, intelligible and free from doubt and uncertainty, rules of construction are unnecessary and of no possible service. In such a case, it is certainly not the province of the courts, by any rules of construction, to make another and entirely different contract for the parties from the one they made for themselves."

As was said by the Supreme Court of the United States

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in *Philadelphia, etc., R. Co. v. Trimble*, 10 Wall. 367, on p. 377: "Where there is doubt as to the proper construction of an instrument, this feature of the case [the construction which the parties have themselves put upon it] is entitled to great consideration. But where its meaning is clear in the eye of the law, the error of the parties cannot control its effect."

It follows, therefore, that the allegations stricken out could not affect the construction of said contract, but were mere surplusage and unnecessarily encumbered the record. The court did not err, therefore, in sustaining appellee's motion to strike out parts of the first paragraph. What we have said in regard to the first error assigned disposes of the fourth assignment of error, which calls in question the action of the court in sustaining appellee's motion to strike out parts of the second paragraph of complaint.

The court overruled appellant's demurrers for want of facts to the fifth and sixth paragraphs of answer to the first paragraph of complaint, and each of these rulings is assigned for error. Each of said paragraphs was good as a general denial, and was sufficient, therefore, to withstand the demurrer thereto. Said paragraphs of answer did not profess to be pleas in confession and avoidance, and even if immaterial matter, mere surplusage, was alleged therein in addition to the general denial, this would not render said paragraphs insufficient. *Coble v. Eltzroth*, 125 Ind. 429, and cases of that class cited by appellant are therefore not in point. Said rulings were not erroneous.

It is insisted by appellant that the court erred in overruling the demurrer to the second paragraph of answer to the second paragraph of complaint. Said second paragraph of answer alleged facts showing that the contract sued upon had been rescinded upon the demand of appellant's decedent in his lifetime upon his claim that appellee had forfeited all its rights thereunder by its failure to perform its part of

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said contract, and that upon said demand and claim appellee acceded to and acquiesced in said decedent's election to forfeit and rescind the same. It is not material whether there had been any breach of said contract by appellee or whether appellant had the right to rescind the same on that account, for when a party, even without right, claims to rescind a contract, if the other party agrees to the rescission, or does not object thereto and permits it to be rescinded, the rescission is by mutual consent. 2 Parsons on Cont. (8th ed.) pp. \* 677 \* 678, bot. p. 793, 794; *Folsom v. Cornell*, 150 Mass. 115, 22 N. E. 705; *Alden v. Thurber*, 149 Mass. 271, 21 N. E. 312. The general effect of a rescission of a contract is to remit both parties to their original rights in respect to the subject-matter thereof. 21 Am. & Eng. Ency. of Law 92-94; *Briggs v. Murtha*, 12 Phila. 179; *Raymond v. Bearnard*, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317, 319; *Gillet v. Maynard*, 5 Johns. (N. Y.) 85, 4 Am. Dec. 329.

It is evident that when a contract is rescinded by mutual consent or otherwise, no action can be maintained for a breach thereof. 21 Am. & Eng. Ency. of Law 92-94; *Haldeman v. Chambers*, 19 Tex. 1, 51, 52; *Briggs v. Murtha*, *supra*; *Kinney v. Kiernan*, 49 N. Y. 164; *De Peyster v. Pulver*, 3 Barb. (N. Y.) 284; *Davis v. Street*, 1 Carr & P. 18, 19, 12 Eng. Com. Law 23, 24. It follows that if said contract was rescinded as alleged, appellant could not recover thereon for anything that occurred before or after the rescission.

The third, fourth, and fifth paragraphs of answer to the second paragraph of complaint were good as general denials, and no error was committed in overruling the demurrers thereto.

The court did not err in sustaining a demurrer to appellant's second paragraph of reply to the second, third, fourth, and fifth paragraphs of answer to the second paragraph of complaint. Said second paragraph of reply alleged that appellee was estopped by the written contract sued upon in

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the complaint from asserting the defense alleged in each of said paragraphs of answer. Said second paragraph of answer alleged a rescission of the contract sued upon, and the third, fourth, and fifth paragraphs were only good as general denials. It is clear that the contract sued upon did not estop appellee from alleging its rescission or denying any breach thereof as alleged. Moreover, even if the court erred in overruling each of appellant's demurrers to the several paragraphs of answer filed in this cause, it affirmatively appears from the record that said errors were harmless. The record shows that at the close of appellant's evidence in chief, the jury, by direction of the court, returned a verdict for appellee.

The only evidence given was on behalf of appellant in support of his complaint on the issue formed by the general denial thereto. Appellee gave no evidence in the cause and therefore gave no evidence to sustain the paragraphs of answer to which demurrers were overruled. It is clear from the record that the failure of appellant to recover a judgment was not on account of any allegations in the answer to which demurrers were overruled, but on account of his failure to establish the allegations of his complaint. It is well settled that where a demurrer is overruled to a bad pleading, and the record affirmatively shows that the verdict and judgment are based upon another paragraph which is good, or when the facts alleged in said pleading are found to be untrue, that the ruling on such demurrer is harmless. Ewbank's Manual, §257. Here the record shows that the judgment against appellant was on account of his failure to establish the allegations of the complaint. The judgment in favor of appellee, therefore, does not rest upon any of the paragraphs of answer to which a demurrer was overruled.

Appellant offered in evidence certain letters written by appellee to John J. Ralya, appellant's decedent; prior to the execution of the contract sued upon, asking for information concerning his improvements in cross-cut saws. These let-



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ters on objection of appellee were properly excluded by the court, for the reason that nothing contained therein was material to any issue in the cause. Even if they were a part of the previous negotiations which resulted in the contract sued upon, they were not admissible, for the reason that they must be regarded as merged in the final agreement. *Bever v. Bever*, 144 Ind. 157, 161; *Phillbrook v. Emswiler*, 92 Ind. 590, 592.

Letters written by appellee to John J. Ralya after the execution of the contract were offered in evidence by appellant, and on objection of appellee were excluded by the court. None of these letters on its face tended in the least to show any breach of the contract by appellee, or to establish any allegation of the complaint, nor was any offer or proposition made by appellant to introduce any evidence on the trial which would make any of said letters competent evidence to support the cause of action alleged in the complaint or any element or part thereof. Several of said letters were in regard to the second patent number 381,814 issued April 24, 1888, all reference to which had been properly stricken from the complaint on motion.

The second patent, number 381,814, dated April 24, 1888, issued to John J. Ralya was offered in evidence, and on objection of appellee was excluded. There was no error in this ruling. We have already held that the contract sued upon did not embrace said second patent, and have sustained the action of the trial court in striking out all reference thereto in each paragraph of the complaint. The fact, if it be a fact, that said letters patent and letters offered in evidence may prove or tend to prove a cause of action against appellee does not make them admissible in this action. The cause of action here is the breach by appellee of the written agreement sued upon, and not some other contract express or implied between said parties.

It was assigned as a cause for a new trial that the court erred in directing the jury to return a verdict for appellee.



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Appellant insists that as the record discloses that appellee offered to pay \$6.25 before the commencement of this action that said instruction was erroneous. As shown by the record, appellant gave in evidence a statement of what purported to be the total number of linear feet of saws, with the different names of the same, manufactured by appellee from May, 1887, when the contract was entered into, to the time of the trial. From this statement it does not appear that any saws covered by the first or second patent were manufactured by appellee.

Moreover, the bill of exceptions does not show that all the evidence given is in the record. It must be presumed, therefore, that other evidence given in the cause explained said offer by showing that it was made under such circumstances, and was of such a character, in the light of the other evidence, as not to tend in the least to show any indebtedness whatever in this action.

The rule is that where anything is left to conjecture all doubts will be solved in favor of the action of the trial court, and this court will adopt the presumption which upholds the judgment appealed from. Ewbank's Manual, §198; Elliott's App. Proc. §709.

Finding no available error in the record, the judgment is affirmed.

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**SCHRADER, ROAD SUPERVISOR, v. THE STATE, EX REL. MASON.**

[No. 19,568. Filed October 30, 1901.]

**OFFICERS.—***Expiration of Office.—Mandamus.—Appeal.*—Where a peremptory writ of mandate was directed to be issued against a road supervisor requiring him to issue a road tax receipt to relator, the action was against the incumbent in his official capacity, and he could not appeal from such judgment after the expiration of his term of office. *pp. 342-344.*

**SAME.—***Road Supervisor.—Mandamus.*—A writ of mandate issued against a road supervisor requiring him to issue a road receipt is binding on his successor in office. *pp. 343, 344.*

157	341
162	568

157	341
f170	369
f170	448

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OFFICERS.—*Expiration of Term.—Appeal.—Substitution of Parties.*

—Where a road supervisor appealed from a judgment after the termination of his term of office and the election and qualification of his successor, his successor cannot be substituted as appellant after the expiration of the time limit for appeal fixed by statute. *pp. 344, 345.*

From Warrick Circuit Court; *E. M. Swan*, Judge.

Mandamus by State on relation of Wm. F. Mason against William Schrader, road supervisor, to compel the issuance of a road tax receipt. From a judgment awarding the writ, defendant appealed after the expiration of his term of office. *Appeal dismissed.*

*S. H. Esarey* and *J. W. Ewing*, for appellant.

*C. A. Weathers*, for appellee.

JORDAN, J.—The State on relation of William F. Mason petitioned the lower court for a mandamus to compel William Schrader, as the supervisor of road district number one, of Troy township, Perry county, Indiana, to issue and deliver to the relator a road tax receipt as a credit upon his road taxes, in consideration of his cutting down and destroying burs and other obnoxious weeds growing along a certain public highway contiguous to the lands owned by the relator. The latter claims his right to such receipt and credit upon his road tax by virtue of an act of the legislature approved March 3, 1897, entitled "An act concerning the cutting down and destroying of briars, thistles, burs, docks, and other obnoxious weeds by owners of lands along public highways." Acts 1897, p. 122. The venue of the action was changed from the Perry Circuit Court to that of the Warrick Circuit Court, wherein a trial upon the issues resulted in the court, on June 12, 1900, rendering its final judgment, whereby a peremptory writ of mandate was directed to issue against Schrader as supervisor, requiring him to issue to the relator a road tax receipt for \$12, the same to serve as a credit on his highway taxes to that amount. On February 1, 1901, Schrader, as such supervisor, appealed from the judgment of the lower court, to this

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court, and on the same day, he, as the appellant in said appeal, filed his assignment of errors, whereby he complained of various alleged erroneous rulings of the trial court, by reason of which he prayed that the judgment below be in all things reversed. On August 28, 1901, appellee filed a motion to dismiss this appeal on the grounds that Schrader was not the supervisor of the road district in question at the time the appeal was taken by him. It is fully established by the verified evidence filed in support of this motion that one Fred Wagner, at the general November election of 1900, was duly elected as the successor of appellant herein, and on the 17th day of November, 1900, said Wagner duly qualified, as provided by law, as the supervisor of road district number one, of Troy township, Perry county, Indiana, and thenceforward has been discharging the duties of said office. It is evident from the facts that Wagner, for over two months prior to the time that the appeal in this case was taken by his predecessor, had succeeded to all the rights and duties of said office. When he was elected and qualified, appellant was thereby divested of his office of supervisor, and no longer had any title or interest therein. As he was neither *de jure* nor *de facto* supervisor of the road district in question, he had no color of right to prosecute this appeal.

Conceding, without deciding, that the duty of issuing the road tax receipt in dispute to the relator was, under the law, incumbent upon Schrader as the supervisor of the district in question, it would follow, therefore, that such duty would continue to rest upon him and his successor in office until performed. In such cases as this, the action is viewed and considered as being against the office to compel the performance of a duty devolving upon it regardless of the incumbent. The action is not against the incumbent in his personal or individual capacity, but is prosecuted against him in his official capacity, and there can be no recovery against him in the capacity of an individual. Conse-

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quently when a peremptory mandate has been awarded against the officer, but his term of office has expired and the writ has not been obeyed, the court may and should order an *alias* peremptory writ to issue against his successor in office, who is bound by the judgment, for the performance of the required act. High on Ex. Leg. Rem., §38; *People, ex rel., v. Supervisor*, 100 Ill. 332.

The mere fact that the judgment in this case for the peremptory writ may have been rendered against Schrader as such supervisor before he was divested of his office by the election and qualification of his successor did not invest him with such an appealable interest or right in the matter as could be enforced by him after the election and qualification of his successor. Where it is disclosed to this court that a party who assumes to appeal a cause has no appealable interest therein, the appeal will be dismissed, for the reason that a party who no longer has any substantial interest in the controversy will not be allowed to prosecute an appeal to this court. Elliott's App. Proc. §526; Ewbank's Manual §142; *Stauffer v. Salimonie, etc., Co.*, 147 Ind. 71.

Whatever appealable interest or right Schrader, in his official capacity, had in the proceedings terminated or ceased after the election and qualification of his successor. The latter, therefore, upon his succession to the office, became bound by the judgment of the lower court, and was entitled to appeal therefrom to this court, instead of his predecessor, provided such appeal was taken within one year from the date of the final judgment.

On October 15, 1901, Wagner, as the successor of appellant, filed an application in this court to be made appellant in this appeal in the place and stead of Schrader. As the appeal by the latter, under the circumstances, is equivalent to no appeal, the granting of this application would operate to allow an appeal to be taken after the expiration of the time limit fixed by the statute. If Schrader had appealed from the judgment before his right or title to the

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office had been terminated, and he had thereafter been divested of his office, the substitution of his successor as appellant would have been proper. The application of Wagner to be made appellant herein is denied, and it follows for the reason stated that the appeal must be dismissed.

Appeal dismissed.

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THE STATE, EX REL. WOOD, v. CONSUMERS GAS TRUST COMPANY.

[No. 19,484. Filed November 1, 1901.]

157	345
158	519
157	345
162	692

**GAS.**—*Refusal of Company to Furnish Gas.*—*Franchises.*—A natural gas company authorized by the legislature to exercise the right of eminent domain, and licensed by a city to lay pipe-lines through its streets and alleys for the distribution of gas to consumers is not relieved from furnishing gas to an applicant in front of whose premises the pipes were laid, because it has an insufficient supply of gas properly to supply its present customers.

From Marion Superior Court; *Vinson Carter*, Judge.

(Mandamus by the State, on relation of Ann E. Wood, against the Consumers Gas Trust Company to compel defendant to permit relatrix to use natural gas from its main. From a judgment for defendant, plaintiff appeals. *Reversed.*)

*J. W. Kern, J. E. Bell and F. W. Ballenger*, for appellant.

*R. N. Lamb, W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller*, for appellee.

**HADLEY, J.**—Suit for a writ of mandate to compel the appellee, a corporation engaged in supplying natural gas to the inhabitants of the city of Indianapolis for fuel, to lay a service-pipe from its main, and permit the relatrix to connect therewith, and use the gas for fuel in her residence. An alternative writ, embodying all the material averments of the complaint, was issued. Appellee, for a return to the

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writ, filed an answer in two affirmative paragraphs. A demurrer to the second was overruled, and to the third sustained. The relatrix elected to stand on her demurrer to the second paragraph, and declining to plead further, judgment was rendered against her for cost. The overruling of said demurrer is the only error assigned.

It is alleged in the alternative writ that the relatrix is a resident of Indianapolis and the owner in fee of a certain lot adjoining and fronting on Bellefontaine street in said city, upon which she has erected a dwelling-house, which she has, at great expense arranged for the use of natural gas, as fuel, by means of a furnace; that no other fuel can be used therein without great detriment and inconvenience, and that a pipe has been properly connected with said furnace and extended therefrom to the exterior of such house and to the property line in front thereof; that the defendant, being a corporation organized under the laws of Indiana, is engaged in the business of operating a natural gas plant and selling to said city and the inhabitants thereof natural gas to be used for fuel; that because of the public character of defendant's business, the city granted to it a valuable franchise and permitted it, among other things, to lay its mains, pipes and conduits, in, through, and beneath the surface of the streets of said city; that said defendant has laid and maintains in said Bellefontaine street, and directly in front of her said dwelling-house one of its mains which it actually uses in transmitting natural gas for use of its patrons; that defendant could by means of a service-pipe easily and conveniently connect its said main with the pipe attached to and connected with the furnace of the relatrix. On September 11, 1899, the relatrix applied to defendant for permission to use its said natural gas in said house, and requested it to lay said service-pipe necessary to connect said main with her said furnace, but the defendant refused to lay said pipe or to permit the relatrix to use said gas, although she advised defendant as to the character of her said

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furnace and the size and dimensions of the burners thereof, and tendered to defendant the sum of \$10 good and lawful money for the use of said gas for a period of six months in advance, that being the customary and usual charge made by the defendant for the use of gas in furnaces of the same character and size; relatrix offered to comply with all the reasonable rules and regulations of the defendant relative to the use of said gas and to the payment therefor. "Wherefore, the relatrix prays that this honorable court issue its alternative writ of mandate, commanding defendant to lay said service-pipe and to permit relatrix to use said gas or show cause why the same shall not be done." The alternative writ commands: "Now therefore you are commanded to lay a service-pipe from your main, on said Bellefontaine street, to the property line in front of said house of relatrix in said city of Indianapolis, and to permit relatrix to use said gas; or in default thereof that you appear before this court \* \* \* to show cause, if any you have, why the same should not be done." The second paragraph of return admits that the defendant is a corporation organized under the laws of Indiana, and that it is engaged in the business of operating a natural gas plant and selling and distributing gas to the city of Indianapolis and its inhabitants to be used as fuel. Among the objects of the corporation, as set forth in its articles of incorporation, are, to drill and mine for natural gas, to purchase, lease, and acquire gas wells and the products thereof, and to furnish the same to patrons for use; to take, hold, convey and mortgage real estate, and to own, operate and maintain such machinery, works, pipe-lines, etc., as the carrying out of the objects above mentioned may require. The capital stock is fixed at \$500,000, and the term of corporate existence fifty years; the articles provide that the entire capital stock shall be placed under the control of a board of trustees, giving such board full and irrevocable power to hold and vote the same; a board of nine directors is to be selected by the trustees; the board of trustees is self-

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perpetuating, all vacancies by death and otherwise to be filled by the survivors. It is also provided that upon the payment by any subscriber to the capital stock of the amount of his subscription, the trustees shall issue a certificate showing the amount of stock held in trust for him, and such subscriber shall be entitled to receive all dividends earned by his stock not to exceed eight per cent. per annum, which dividends shall be paid in money or applied to the indebtedness of such subscriber to the corporation, as a consumer of gas; also that when such certificate holder shall have received by dividends or otherwise upon said certificate an amount equal to his subscription, with interest at the rate of eight per cent. per annum thereon, and after payment of all indebtedness of said company, then it shall be the duty of the directors of said company to reduce the price of gas so that the same shall thereafter be supplied to consumers at cost. It is alleged that the defendant was organized as a voluntary enterprise in the general interest of the people of Indianapolis and not for the purpose of making money for any one, but solely for the purpose of furnishing gas to consumers in the city at the lowest possible rate, the same not to exceed, in any event, the schedule of prices fixed by the existing ordinance; that since its organization said company has been operating in pursuance of the laws of the State, furnishing gas for heating to the people of Indianapolis at prices not exceeding certain rates theretofore fixed by an ordinance of the city; that 6,712 citizens of Indianapolis subscribed for 25,675 shares of stock, aggregating \$641,875, of which amount \$605,258 was paid; that certificates of indebtedness were sold to the amount of \$112,000 and that \$429,000 of such certificates were used in the purchasing of pipe and other material; that the defendant made every possible effort, by soliciting subscriptions and the sale of certificates of indebtedness, to raise the necessary funds to pay for its plant, and also made an unsuccessful effort to sell \$1,500,000, of its bonds, so that its



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only capital and resources were derived from stock subscriptions, the sale of its certificates, and from the revenues derived from the sale of gas; that with the money so derived it purchased and laid pipe-lines of various sizes, aggregating 378 miles; that it has drilled and connected with its pipe-lines 404 natural gas wells, of which 105 have been exhausted and abandoned; that it has purchased rights of way, and has leased 78,287 acres of land for the purpose of drilling gas wells thereon; that it has built and equipped a compressing station in Hamilton county at an expense of \$62,000 and is engaged in building another in Madison county, which will cost \$75,000, a large part of which last amount has been paid; that all its funds, revenues and resources have been thus expended in the necessary expense of carrying on its said business of supplying gas; that its trustees and directors have served without pay, though many of them have rendered arduous services. That at the time the company was organized natural gas had been developed in Marion and Hamilton counties, which was believed to be inexhaustible; that the well pressure was then 325 pounds to the square inch; that the wells in Marion county and eighty of the 100 drilled in Hamilton county have been exhausted and abandoned, and others in that county are of little value; that the average pressure of the wells now in use has declined from 294 pounds to the square inch on January 1, 1899, to 132 pounds to the square inch on July 1, 1899; that in the best gas territory the highest pressure from a new well does not exceed 200 pounds to the square inch. That the defendant is furnishing natural gas fuel to 13,000 residences and dwelling-houses in said city, and a large number of other houses, but that by reason of the diminution of the quantity of gas and the reduction of pressure, it cut off, several years ago, during the cold weather many of its largest customers, such as factories, thus discriminating in favor of residences; that it has been wholly unable during the past two seasons to supply a suffi-

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cient amount of gas to the consumers already on its lines, when the weather is cold, and that during the winter of 1898 and 1899 hundreds of its patrons were left almost entirely without gas, and as a consequence much suffering resulted; that the colder the weather, the greater was the deficiency of gas and the less its ability to supply the same; that there is a serious menace and danger in the condition that results from an insufficient supply of gas, in that the fires in houses insufficiently supplied are liable to go out without notice to the occupants, and "then the gas flowing in again is liable to cause explosions and great danger." "That in view of the facts and conditions above set forth, which it has been and still is impossible for this defendant to remedy, and because it has become a physical impossibility for it to furnish additional consumers with gas, defendant, by its board of directors, on the 3rd day of May, 1899, made an order that in view of the premises it could not make any new contracts to furnish consumers with gas; that like orders covering the cold weather had been made each autumn for five years prior thereto;" that defendant's refusal to furnish gas to relatrix is by reason of the facts recited and the said order, and not because of a disposition to discriminate against her; that other equally meritorious applications have been denied and all applicants have been refused; that if defendant should comply with the demands of relatrix and others for natural gas fuel, it would be unable to give them an adequate supply, but by so much as it would give to them, it would reduce the supply that it would be able to give to its patrons already connected, and thereby render its service inefficient in a greater degree to all of its customers; that after the completion of its new compressing station referred to, it is entirely certain it will not be able to supply adequately any more customers than it already has, nor to supply additional customers at all; that if the house of relatrix were connected with its lines it would be impossible for defendant to furnish her and its other customers the natural

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gas necessary for their needs and proper demands, and it would be impossible to furnish her any gas whatever without wrongfully withholding the same from other customers already connected, having older and prior rights thereto, and if she were furnished gas fuel hundreds of others making like applications would have to be furnished, thereby rendering its supply and services to all its customers inadequate and insufficient.

Writs of mandate must specify the particular things required to be done. 13 Ency. Pl. & Pr. 684; High on Ex. Leg. Rem. (3rd ed.) §539; Merrill on Mandamus, §260; 2 Spelling's Ex. Relief, §1653; *People v. Brooks*, 57 Ill. 142; *School District v. Lauderbaugh*, 80 Mo. 190.

The things requested and commanded of the appellee were to lay a service-pipe from its main in Bellefontaine street to the property line in front of the relatrix's house, and to permit her to use the gas. The mandate is not to furnish the relatrix with an adequate or any definite amount of gas, but the obvious force and limitations of the request, and order, are to require the appellee to furnish her with the necessary means, and permit her to use the gas upon the same terms that other inhabitants of the city are permitted to use it. Is it the legal duty of appellee to do these things? Mandamus is a proper remedy to compel appellee to furnish gas to the relatrix if it is shown that she is entitled to it. *Portland, etc., Co. v. State, ex rel.*, 135 Ind. 54, 21 L. R. A. 639.

The appellee is a corporation authorized by the legislature to exercise the right of eminent domain (Acts 1889, p. 22), and licensed by the city of Indianapolis to lay pipes through its streets and alleys for the transportation and distribution of natural gas to its customers. These rights, which involve an element of sovereignty, and which can exist only by grant from the public, are rooted in the principle that their exercise will bestow a benefit upon that part of the public, in whose behalf the grant is made, and the benefit received by the citizens is the adequate consideration for the

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right and convenience surrendered by them. The grant thus resting upon a public and reciprocal relation, imposes upon the appellee the legal obligation to serve all members of the public contributing to its asserted right, impartially, and to permit all such to use gas who have made the necessary arrangements to receive it, and apply therefor, and who pay, or offer to pay, the price, and abide the reasonable rules and regulations of the company. *Portland, etc., Co. v. State, ex rel.*, 135 Ind. 54; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 36 L. R. A. 535; *Haugen v. Albina, etc., Co.*, 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424; *People v. Manhattan Gas Co.*, 45 Barb. 136; *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S. W. 1058; *American, etc., Co. v. State*, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447; *State, ex rel., v. Butte City Water Co.*, 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. 574.

But, without controverting the law as declared in the foregoing cases, or claiming exemption from the rule, it is answered as a justification for denying the relatrix the use of gas, that the corporation was organized as a voluntary enterprise in the general interest of the people of Indianapolis; that its purpose was not the making of money for any one, but to furnish gas to consumers in the city at the lowest possible rate, and that the supply of gas the corporation has on hand, or that it may possibly procure, is insufficient to supply what customers it has now connected with its mains, in severely cold weather, and that to permit the relatrix to use gas would be to further reduce the already insufficient supply. Will these facts relieve the appellee of its duty to permit the relatrix to use its gas? If they will, then it must be true that the relatrix is not entitled to share in the gas furnished by appellee to the inhabitants of the city, because her participation will reduce the possible supply below the full requirements of those already being served.

It is proper to observe that the present consumers of ap-

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pellee's gas are not here complaining of the quantity of gas received by them, or protesting against the admission of the relatrix to a share of the supply, and it is difficult to see how the appellee, while continuing to assert and exercise its extraordinary rights, may set up its own default or probable default to others as a legal excuse for the non-performance of its duty to the relatrix.

The legal effect of the answer is that the relatrix shall have no gas because her neighbors, in common right, have none to spare. It is admitted, because not denied, that the relatrix is a member of that part of the public which appellee has engaged to serve. As such she has borne her part of the public burdens. She has rendered her share of the consideration. Bellefontaine street in front of her house has been dug up and her property made servient to the use of appellee in laying its pipes, and in carrying forward its business, and her right to use the gas, and to share in the public benefit, thus secured, whatever it may amount to, is equal to the right of any other inhabitant of the city. The right to gas is held in common by all those abutting on the streets in which appellee has laid its pipes, or it is held of right by none. The legislature alone can authorize the doing of the things done by appellee, and this body is prohibited by the fundamental law from granting a sovereign power to be exercised for the benefit of a class, or for the benefit of any part of the public less than the whole residing within its range. Cooley's Con. Lim. (6th ed.), p. 651, and cases cited.

Appellee's contract is with the State, and its extraordinary powers are granted in consideration of its engagement to bring to the community of its operations a public benefit; not a benefit to a few, or to favorites, but a benefit equally belonging to every citizen similarly situated who may wish to avail himself of his privilege, and prepare to receive it. There can be no such thing as priority, or superiority, of

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right among those who possess the right in common. That the beneficial agency shall fall short of expectation can make no difference in the right to participate in it on equal terms. So if appellee has found it impossible to procure enough gas fully to supply all, this is no sufficient reason for permitting it to say that it will deliver all it has to one class to the exclusion of another in like situation. It is immaterial that appellee was organized to make money for no one, but to supply gas to the inhabitants of Indianapolis at the lowest possible rate. It has pointed us to no special charter privilege, and under the law of its creation, certain it is, that its unselfish purpose will not relieve it of its important duty to the public. The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas, and other like companies, and has been many times discussed and decided by the courts, "and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike, who are like situated, and not discriminate in favor of, nor against any." 45 Cent. L. J. p. 278; *Haugen v. Albina, etc., Co.*, 21 Ore. 411; *Olmsted v. Proprietors, etc.*, 47 N. J. L. 311; *Stern v. Wilkesbarre Gas Co.*, 2 Kulp. 499; *Chicago, etc., Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Nebraska Tel. Co. v. State*, 55 Neb. 627, 634; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. 841; *State, ex rel., v. Delaware, etc., R. Co.*, 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

In a further material sense the discrimination asserted by the answer becomes injurious to the relatrix. It is a matter of common knowledge that natural gas is a cheap and convenient fuel, and for many reasons is eagerly sought by those who may reasonably obtain it. It is, therefore, of like knowledge, that in a community where it is supplied to some premises, and denied to others, the effect is to enhance

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the value of such parcels as have it, by making it more desirable and profitable to occupy them, and to depreciate the value of such parcels as are excluded from its use. It is very clear that appellee may not, under the guise of administering a public benefit, exercise a public power, to take the property of one and confer it upon another.

The principal argument of appellee's counsel is, that not having sufficient gas to supply its present customers, and having exhausted every available means for increasing its supply, it is therefore impossible for it to perform its public duty, and mandamus will not lie to compel an attempt to perform a duty impossible of performance. We concede in the fullest terms that mandamus will not lie to require an attempt to do a thing shown to be impossible. But this is not the question we have before us. The relatrix is not asking, nor the court commanding that the company attempt to increase its supply of gas. The relatrix is only seeking to be permitted to share in the quantity of gas the company has at its command, whatever that may be, on the same terms that others are permitted to use it. There is in the request of the relatrix nothing unreasonable, and nothing impossible of performance. The whole question comes to this. The appellee under public grant for the dispensation of a public good, has taken possession of certain streets and alleys in Indianapolis for the distribution and sale of natural gas to those abutting on its lines. The relatrix owning a lot abutting on one of appellee's lines erected thereon a dwelling-house, and upon the faith of being permitted to use the gas has piped her house, and constructed her heating apparatus of a form, suitable only to the use of natural gas as a fuel, which will be worthless if natural gas is denied her. She has in common with other abutters been subjected to the inconvenience of having the street in front of her house dug up and had her property occupied with the company's pipes. She has made all necessary arrangements to receive the gas, has tendered appellee its usual charges, has offered to abide



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by its reasonable rules and regulations, and we perceive neither legal reason, nor natural justice, in denying her the rights accorded to those of her neighbors who have contributed in the same way to appellee's enterprise. The second paragraph of answer was insufficient, and the demurrer thereto should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the second paragraph of the return to the alternative writ of mandate.

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THE STATE EX REL. JOHNSTON v. WAYNE COUNTY COUNCIL.

[No. 19,585. Filed November 1, 1901.]

COUNTIES.—*County Council.—Appropriations.—Special Session.—*

Only in a case of emergency arising after the close of the regular annual meeting of the county council can further appropriations be made at a special meeting of such council. *p. 359.*

SAME.—*County Council.—Appropriations.—Special Session.—*The

failure of the county council at a regular meeting to make an additional appropriation to cover a claim filed by a township assessor for services rendered does not show an emergency within the meaning of §5594a1 Burns 1901 to justify a special session for the purpose of making the additional allowance. *p. 359.*

SAME.—*County Council.—Failure to Make Appropriation.—*The fail-

ure or refusal of the county council to make an appropriation to pay a claim against the county does not affect the validity of the claim. *p. 359.*

SAME.—*County Council.—Appropriations.—Mandamus.—*Where the

amount of a claim is not fixed by law or ascertained by judgment, the county council may in its discretion refuse to make an appropriation for its payment, and the exercise of such discretion cannot be controlled by the courts by their writ of mandamus. *p. 359.*

From Wayne Circuit Court; *H. C. Fox*, Judge.

Mandamus by State, on relation of Samuel J. Johnston, against Wayne County Council and others to require the council to make an additional appropriation for the payment of relator's services as township assessor. From a judgment for defendants, relator appeals. *Affirmed.*



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*C. E. Shively* and *A. C. Lindemuth*, for appellant.

*T. J. Study* and *J. L. Rupe*, for appellee.

DOWLING, J.—The relator applied to the Wayne Circuit Court for a writ of mandate requiring the auditor to convene the Wayne county council in special session, and commanding that body, when so convened, to make an additional appropriation of the funds of Wayne county to pay an alleged claim of the relator for services rendered by him as assessor of Boston township. An alternative writ was issued, and on motion of the appellee, the Wayne county council, the same was quashed by the court. To this ruling the relator excepted, and, electing to stand upon his complaint and writ without amendment, judgment was rendered against him. The relator appealed, and insists that the court erred in quashing the alternative writ, and in rendering judgment against him.

The material allegations of the complaint and writ are as follows: The relator, Johnston, is, and during the times mentioned in the complaint and writ was, the assessor of Boston township, Wayne county, Indiana; on April 1, 1900, he began the work of assessing the real and personal property within his township, and continued such work until finished; he was actually and necessarily occupied in such work sixty days, and there is due him as compensation therefor, at \$2 per day as prescribed by law, the sum of \$120; prior to the Thursday following the first Monday in August, 1899, to wit, on July 21, 1899, he prepared an estimate of the amount of money required for his office for the ensuing calendar year, which estimate amounted to \$120, and such estimate was presented to the auditor of said county, and filed with that officer on the same day; said estimate was by the auditor kept on file in his office, subject to inspection by any taxpayer of the county, and due notice of the same was given by said auditor before the presentation of said estimate to the Wayne county council at its regu-

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lar annual meeting on the first Tuesday after the first Monday of September of said year; on said last named date the auditor presented said estimate to the Wayne county council, which neglected and refused to make a sufficient appropriation to pay said claim, but appropriated \$90, only, as compensation for the services of the relator. On June 4, 1900, the relator filed with the auditor of said county an itemized bill of the services rendered by him as such township assessor, verified by his oath, and on the 23rd day of July, 1900, that officer audited the said claim, and found that there was due to the relator thereon the sum of \$120; said auditor thereupon issued to the relator his warrant upon the county treasurer for \$90, so appropriated as aforesaid by the Wayne county council, but refused to issue a warrant for the full amount of said sum of \$120 because a sufficient appropriation had not been made therefor. The relator appeared before the Wayne county council September 4, 1900, at a regular meeting thereof, and demanded that an additional appropriation be made by said council to pay the balance due on his claim, but his demand was refused. The appellee Reid is the auditor of said county; there is due on relator's claim the sum of \$30; the auditor is unable to issue a warrant for the same for the reason that no appropriation has been made to pay it; the Wayne county council is now in session, and will not again be in session unless specially called by the auditor until January, 1901.

The complaint concluded with a prayer for an alternative writ commanding the auditor to call together the Wayne county council, in special session, to make an order for an additional appropriation of the funds of the county to pay the balance of relator's said claim.

The case seems to be a plain one. The action of the court in quashing the writ was clearly right. The compensation of the relator was not a fixed salary, but was so much per diem for an indefinite period not exceeding sixty days. He could not fix the amount to be paid to himself, nor had

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the auditor or the board of commissioners authority to do so. The relator's claim did not differ from other unliquidated demands against the county. Acts 1899, p. 343, §§17, 19, §§5594w, 5594y Burns 1901.

This case is easily distinguishable from *Morris v. State*, 96 Ind. 597. There, the clerk was the agent of the county in purchasing the goods; he had no personal interest in the demand; and the statute made his certificate sufficient evidence of the claim.

The county council could not be compelled by mandate to make a further appropriation for the payment of this demand. Only in a case of emergency, arising after the close of the regular annual meeting of the county council, can further appropriations be made at a special meeting of such council. In the present case, no emergency was shown to exist, and unless a judgment has been recovered on the claim it is difficult to conceive of such an emergency as is contemplated by the statute. §5594a1 Burns 1901.

The failure or refusal of the county council to make an appropriation to pay a claim against the county does not affect the validity of the claim. Its payment, however, is postponed until an appropriation is made, and public funds are provided to meet it.

Where the amount of the claim is not fixed by law, or is not ascertained by judgment, the county council may, in its discretion, refuse to make an appropriation for its payment, and the exercise of such discretion cannot be controlled by the courts by their writ of mandamus.

The motion to quash the alternative writ was properly sustained. We find no error. Judgment affirmed.

State v. Sopher.

## THE STATE v. SOPHER.

[No. 19,618. Filed November 1, 1901.]

**CRIMINAL LAW.—Appeal.—Prosecuting Attorney may Perfect Appeal.**

—The prosecuting attorney is impliedly authorized to subscribe his name to appeal notices, and to prepare and sign assignments of errors, and take all necessary steps leading up to an appeal to the Supreme Court by the State in a criminal cause. *pp. 361, 362.*

**INTOXICATING LIQUORS.—License.—Appeal.**—Section 4 of the act of 1875 (Acts 1875, p. 55), regulating and licensing the sale of intoxicating liquors, being impressed with such ambiguity and uncertainty as to render it open to judicial construction, an appeal from a prosecution under such statute for selling intoxicating liquors without license is authorized by §8 of the act of 1901 (Acts 1901, p. 565). *pp. 362, 363.*

**SAME.—Appeal from Order Granting License.—Right to Sell Pending Appeal.**—“*Next Term of Court.*”—“The next term of court,” as used in §5315 R. S. 1881, providing that no appeal from the order of the board of county commissioners granting a license to sell intoxicating liquors shall estop the person receiving such license from selling intoxicating liquors thereunder until the close of the next term of court, etc., means the first term of court at which complete jurisdiction, under the law, over the parties to such appeal would be acquired. *pp. 365-372.*

**SAME.—Appeal from Order Granting License.—Right to Sell Pending Appeal.**—The time within which a person licensed to sell intoxicating liquors may continue to sell under §5315 R. S. 1881, pending an appeal to the circuit court, begins with the issue of the license and terminates at the close of the term of court during which the cause may be lawfully tried. *pp. 372, 373.*

**SAME.—Appeal from Order Granting License.—Right to Sell Pending Appeal.**—The act of 1875 (Acts 1875, p. 55, §5315 R. S. 1881), does not abrogate the rule that an appeal from the decision of the board of county commissioners granting a license to sell intoxicating liquors operates as a suspension of all rights of the applicant thereunder, but modifies the rule to the extent that his rights thereunder do not terminate until the close of the next term of court during which the cause may be lawfully tried. *pp. 373-376.*

From Hamilton Circuit Court; *J. F. Neal*, Judge.

From a judgment acquitting William L. Sopher of the charge of selling intoxicating liquors, the State appeals on reserved questions of law. *Appeal sustained.*

157	360
159	316
157	360
165	345
165	346
157	360
169	483
169	515

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*W. L. Taylor, Attorney-General, C. C. Hadley, Merrill Moores, J. F. Beals and W. L. Carey, for State.*

*G. Shirts and W. R. Fertig, for appellee.*

JORDAN, J.—Appellee was prosecuted in the lower court for the crime of selling intoxicating liquors without being duly licensed according to the laws of this State. On a trial before a jury he was acquitted of the charge, and the court rendered its final judgment discharging him. The State, under §1915 Burns 1901, §1846 Horner 1897, reserved certain questions of law arising on the charge of the court to the jury, and by virtue of the provisions of section eight of an act of the legislature entitled “An act concerning appeals,” etc., approved March 12, 1901 (Acts 1901, p. 565), §1337h Burns 1901, this appeal is taken directly to this court for the purpose of presenting and having determined the question in respect to the proper construction of the second proviso of section four of an act of the legislature, to regulate and license the sale of intoxicating liquors, etc., approved March 17, 1875 (Acts 1875, p. 55), §7279 Burns 1901, §5315 R. S. 1881 and Horner 1897.

Appellee has moved to dismiss this appeal principally upon the grounds (1) that the notices thereof given to the clerk of the lower court and to appellee were signed by the prosecuting attorney, instead of being signed by the Attorney-General; (2) that the assignment of errors has been signed by the prosecuting attorney instead of the Attorney-General; (3) because the appeal does not present a question arising upon the proper construction of a statute within the meaning of §1337h Burns 1901.

Section 1915 Burns 1901, §1846 Horner 1897, provides that “The prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the Supreme Court. \* \* \* In case of the acquittal of the defendant, the prosecuting attorney may take the reserved case to the Supreme Court upon an appeal at any time within one year.” That the proper

prosecuting attorney, in all criminal cases appealable by the State, is fully authorized to subscribe his name to the appeal notices required by §1960 Burns 1901, §1887 Horner 1897, and to take all of the necessary steps leading up to an appeal to this court, can not be successfully disputed. It is true that it may be properly asserted that the Attorney-General, under the law, has a general supervision over all of the litigation pertaining to the State, or in which the latter is concerned, and in the event, in a criminal case, the prosecuting attorney should fail or refuse to take the necessary steps to effectuate an appeal by the State, the Attorney-General may interpose and take the steps required to perfect such an appeal. The prosecuting attorney being empowered, under the statute, to take an appeal when the defendant is acquitted in a criminal cause, is impliedly authorized to do all and singular that which is essential in appealing a cause to this court, including preparing and signing the assignment of errors. When an appeal in a criminal cause, whether taken by the State or by the defendant, reaches this court, it then, under the law, becomes the imperative duty of the Attorney-General to represent the State therein. *State, ex rel., v. Jamison*, 142 Ind. 679; *Stewart v. State*, 24 Ind. 142.

In *State v. Jamison, supra*, we said: "While the services of the prosecuting attorney may be and generally are accepted by the Attorney-General, in behalf of the State, in such appeals, still the latter officer has the exclusive control and management of the case upon appeal." While we have said that the prosecuting attorney is authorized to subscribe the assignment of errors when the State appeals, still the Attorney-General is equally empowered to sign such pleadings, and the signature thereto of either of these officials will suffice.

In regard to the third ground alleged in the motion to dismiss, it may be asserted that the record discloses that the charge of the court of which the State complains clearly

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raises a question relative to the proper construction of the second proviso of the fourth section of the statute under which appellee applied for license. The crime of which appellee was charged is but a misdemeanor, in which appeals to this court or the Appellate Court, as a general rule, by virtue of the provisions of the act of March 12th, *supra*, are no longer allowed, except for the purposes specified in §1337h Burns 1901. An examination, however, of the provision of the statute in question fully discloses that it is, at least, impressed with some ambiguity or uncertainty, therefore it is open to judicial construction, and this appeal, under the circumstances, must be held to be authorized within the meaning of §1337h, *supra*, for the purpose of presenting the question only as to the proper construction of that provision. The motion to dismiss is therefore denied.

Turning to the facts in this case which were agreed to by both parties upon the trial below, and introduced as the evidence in the case, we find them to be substantially as follows: At the December session of the board of commissioners of Hamilton county, Indiana, William L. Sopher, appellee herein, after giving the required notice, filed his application before said board for a license to be granted to him to sell intoxicating liquors, with the privilege of allowing the same to be drank upon the premises where sold, such premises being a certain building situated in one of the wards of the city of Noblesville, in said Hamilton county, Indiana. Certain voters and citizens of the township and ward in question remonstrated in writing before the board against granting a license to appellee to sell intoxicating liquors, for the alleged reason that he was not a fit person to be entrusted therewith. The application and remonstrance were heard by the board of commissioners at its said December session, and thereupon a license to sell such liquors, with the privilege of allowing the same to be drank on the premises where sold, was granted to appellee. On December 11, 1899, after being awarded a license by the board, as aforesaid, and be-

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fore an appeal to the circuit court had been taken by the remonstrators, appellee paid to the treasurer of said Hamilton county \$100 as required by the statute, and executed the necessary bond to the approval of the county auditor, and thereupon the latter official in pursuance of said order of the board, issued a license to him to sell intoxicating liquors in the building designated and described in his notice and application. On December 16, 1899, after the issuing of the license to appellee, and within ten days from the date of the order of the board granting the same, the remonstrators in said cause filed their appeal bond with and to the approval of the county auditor and duly appealed from said order of the board of commissioners to the Hamilton Circuit Court, and thereupon a transcript of all of the proceedings before the board in said matter was filed by the auditor with the clerk of the Hamilton Circuit Court, on December 29, 1899, the latter date being during the November term, 1899, of said court, and said cause was thereupon docketed as a cause pending therein. The February term, 1900, of the Hamilton Circuit Court, being the term next following the November term, began on the first Monday in February, 1900, and closed on the 29th day of March, 1900. On the 6th day of March, 1900, the remonstrators filed a motion in said cause to quash the notice given by the appellee of the pendency of his application before the board of commissioners, which motion was finally overruled in the Tipton Circuit Court, to which said cause was venued as hereinafter shown. At the April term, 1900, of the Hamilton Circuit Court, which term commenced on the first Monday of April, appellee applied for and secured a change of venue of said cause to the Tipton Circuit Court. At the April term, 1900, of the latter court, which term commenced on the 4th Monday in April, appellee applied for and obtained a change of venue from the regular judge, and subsequently, at the same term, he applied for and secured a continuance of the cause until the following August term of said court. In September,



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1900, during the said August term, an amended remonstrance was filed by the remonstrators, and various motions were made in said cause, and on the 23rd day of November, 1900, at the time of the trial of appellee on the said charge of the unlawful selling of liquor, said cause still remained pending and undetermined in the said Tipton Circuit Court. On July 14, 1900, in Hamilton county, Indiana, appellee, assuming to act under his said license, sold to one Lee Farley, a pint of intoxicating liquors, to wit, whiskey, for the price of twenty-five cents. Appellee admitted this sale and sought to justify his action in selling it under the authority of the license granted to him by the board of commissioners. The lower court, on the foregoing facts, gave to the jury the following instruction: "If you find from the evidence that in December, 1899, the board of commissioners of this county upon petition and notice granted the defendant a license to sell liquors in less quantity than a quart at a time, that defendant gave bond approved by the auditor, and the auditor issued the accused a license to sell such liquors, that the sale charged herein was made under such license and at the premises described therein, then you should find the defendant not guilty. In such case it makes no difference that certain remonstrators appealed from the order of the board granting such license. The license would protect the defendant from sales made pending such appeal, and if the appeal is still pending the defendant had the right to make the sale charged herein and you should in such case find the defendant not guilty." To the giving of this charge, the State, through its prosecuting attorney, duly excepted, and reserved thereon a question of law for the decision of this court on the appeal of said cause.

Passing the deficiency of this instruction arising out of its omission to inform the jury that it was also incumbent upon the appellant to pay to the county treasurer the license fee of \$100, as required by §5 of the act of 1875, as amended in 1897 (Acts 1897, p. 253), §7281 Burns 1901,

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§5316 Horner 1897, in addition to giving the required bond, before the auditor, under the law, would be authorized to issue to him the license awarded him by the board, we may proceed to determine whether the court, by this charge, when applied to the facts in this case, properly construed or interpreted the meaning of the proviso in controversy. Section 4 of the liquor law of 1875, being §7279 Burns 1901, §5315 R. S. 1881 and Horner 1897, provides that "The board of county commissioners, at such term, shall grant a license to such applicant upon his giving bond to the State of Indiana, with at least two freehold sureties resident within said county, to be approved by the county auditor, in the sum of \$2,000, \* \* \* *Provided*, Said applicant be a fit person to be intrusted with the sale of intoxicating liquor, and if he be not in the habit of becoming intoxicated; but in no case shall a license be granted to a person in the habit of becoming intoxicated: *Provided*, That no appeal taken by any person from the order of the board granting such license shall operate to estop the person receiving such license from selling intoxicating liquor, thereunder, until the close of the next term of the court in which such appeal is pending and at which such cause might be lawfully tried; and he shall not be liable as a seller without license for sales made during the pendency of such appeal, but he shall be liable for the violation of any of the provisions of this act during such time, the same as if regularly licensed."

As previously said, it is the part of section four embraced in this last proviso over which the controversy in regard to the proper construction thereof arises. When the instruction in question is considered, it discloses that the trial court was of the opinion that at the time the accused sold the intoxicating liquor in controversy he was protected by his license under this provision of the statute, notwithstanding the fact that the appeal taken by the remonstrators to the circuit court from the order of the board was still pending undetermined on the docket of the Tipton Circuit Court.

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Or, in other words, the court construed this provision of the statute to mean that such appeal at no time during its pendency would operate to suspend or terminate the right of the appellee to sell intoxicating liquors under the license granted to him by the board of commissioners. It is manifest that the question presented by the State, in respect to the alleged error of the court in charging the jury under the facts in this case, must necessarily depend for a solution on the meaning and scope of the provisions of the above proviso. It has been settled by numerous decisions of this court that an appeal to the circuit court from an order of the board of commissioners stands for trial *de novo*, and that such appeal operates to suspend or vacate the proceedings and order of the board from which it is taken. *Meehan v. Wiles*, 93 Ind. 52, and cases there cited; *Lincoln v. State*, 86 Ind. 161; *Hardy v. McKinney*, 107 Ind. 364; *Head v. Doehleman*, 148 Ind. 145, and cases there cited.

Aside from the general rule which governs appeals to the circuit court from boards of commissioners, justices of the peace, and other inferior courts or tribunals, such would necessarily be the effect of §7864 Burns 1901, §5777 R. S. 1881 and Horner 1897, which pertains to appeals from boards of commissioners, and which has been in force since 1853. This section provides that every appeal from the board of commissioners to the circuit court "shall be docketed among the other cases pending therein, and the same shall be heard, tried and determined as an original cause." Under this provision of the law it has been universally held by this court that appeals from boards of commissioners stand for trial in the circuit court *de novo* and that such appeal suspends or vacates the order of the board and all proceedings in the matter. *Hardy v. McKinney*, 107 Ind. 364, and cases there cited.

The rule declared and enforced by this court under this section, long before the passage of the liquor law of 1875, had been held by this court to apply to appeals taken by

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remonstrators to the circuit court from an order of the board of commissioners granting a license to an applicant to sell intoxicating liquors under the liquor law of March 5, 1859. Such appeals were held to suspend or vacate the order of the board and the right of the licensee to sell under the license granted to him. *Molihan v. State*, 30 Ind. 266; *Young v. State*, 34 Ind. 46; *Blair v. Kilpatrick*, 40 Ind. 312; *Mullikin v. Davis*, 53 Ind. 206.

It is true that the liquor law of 1859 had been repealed prior to the enactment of the act of 1875, by an act of the legislature known as the Baxter law, passed in 1873. If we eliminate the proviso in controversy from the act of 1875, the latter in its general provisions and scope will be found, in the main, to be similar to the act of March 5, 1859. 1 Gavin & Hord, p. 614. We may then reasonably presume that the legislature which enacted the law of 1875 recognized what the effect of an appeal to the circuit court from an order of the board of commissioners granting a license, taken by persons who might remonstrate under the authority of that statute, would be upon the right of the licensee to sell under his license during the pendency of such appeal, when tested by the rule declared by this court in respect to the effect of such appeal under the former law; hence the reason or cause which prompted the legislature to modify or change the rule, by virtue of the proviso in dispute, must be evident. The question presented then is, to what extent did the legislature intend to modify the operation of the rule which had been previously held to be applicable to an appeal by remonstrators from an order of the board granting a license to a person to sell intoxicating liquors? In construing a statute, or any part thereof, courts are not authorized to disregard the plain language employed by the lawmakers in its enactment. It is the duty of the court to accept the act as written, and if valid to enforce it as enacted. And where the law is clear upon its face, and when standing alone is fairly susceptible of but one construction,

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that construction must be given. It has been properly said by the Supreme Court of the United States that the province of construction lies wholly within the domain of ambiguity. *Hamilton v. Rathbone*, 175 U. S. 414-421, 20 Sup. Ct. 155, 44 L. Ed. 219.

The language of the proviso in question is: "That no appeal taken by any person from the order of the board granting such license shall operate to estop the person receiving such license from selling intoxicating liquor, thereunder, until the close of the next term of the court in which such appeal is pending *and at which such cause might be lawfully tried*; and he shall not be liable as a seller without license for sales made *during the pendency of such appeal*, but he shall be liable for the violation of any of the provisions of this act during such time, the same as if regularly licensed." (Our italics.) A reading of this particular provision demonstrates the fact that it may be said to be uncertain or ambiguous, at least in two respects: (1) As to what is meant or intended by the words "the term of court \* \* \* at which such cause might be lawfully tried"; (2) as to the meaning of the clause "he shall not be liable as a seller without license for sales made during the pendency of such appeal." Where a statute is of a doubtful or uncertain meaning, and susceptible, upon its face, of two constructions, courts, in order to discover the true legislative intent and purpose, may refer to prior or contemporaneous acts. They may inquire in respect to the reasons which prompted the legislature in the enactment of the law, and also may consider the mischief, if any, intended to be remedied, and may consider the situation and condition of affairs existing **at the time of the passage of the law**, and all acts in *pari materia* passed either before or after the statute in question, whether repealed or unrepealed. All may be referred to and considered in order to discern what the legislature intended by the use in the statute of some particular term or

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terms, or in the enactment of a particular provision. *Stout v. Board, etc.*, 107 Ind. 343; *Board, etc., v. Board, etc.*, 128 Ind. 295; *State Board v. Holliday*, 150 Ind. 216, 42 L. R. A. 826; *Parvin v. Wimberg*, 130 Ind. 561, 15 L. R. A. 775, 30 Am. St. 254; *Conn v. Board, etc.*, 151 Ind. 517. In our search to ascertain the scope of the legislative intent and purpose in the enactment of the particular provision, we will endeavor to be guided, so far as necessary, by these well settled canons of construction.

At and prior to the passage of the act of 1875, it will be found that all appeals from the order of the board of commissioners were controlled by §§7859, 7860 Burns 1901, §§5772, 5773 R. S. 1881 and Horner 1897. Appeals from an order of the board of commissioners, either granting or refusing to grant a license to sell intoxicating liquors, were held to be controlled by these particular sections. *Wright v. Harris*, 29 Ind. 438; *Blair v. Kilpatrick*, 40 Ind. 312.

Section 5773, R. S. 1881, provides that the appeal shall be taken within thirty days from the time the decision of the board was rendered, by filing an appeal bond, etc. Section 5775 R. S. 1881 provides that if the appeal is taken in vacation, a summons sued out of the clerk's office of the court to which the appeal is taken shall be served on the appellee requiring him to appear in court and answer said appeal. Section 5776 R. S. 1881 provides that "If such appeal shall be filed, and such summons, when necessary, served ten days before the first day of the court next after such appeal, such cause shall stand for trial at such term; otherwise it shall be continued until the next term of the court." Consequently as the law relating to appeals from boards of commissioners stood at the time of the enactment of the license act of 1875, an appeal from the board of commissioners to the circuit court might be taken at any time within thirty days, by either party to the proceedings if aggrieved by the board's decision. If a transcript of the proceedings before

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the board provided by §5774 R. S. 1881 and Horner 1897 was not filed with the clerk of the circuit court ten days prior to the beginning of a term of that court, and when necessary by reason of the appeal not being prayed for before the board in term time, a summons was not also served on the appellee, for an equal number of days before the commencement of the term, the cause could not lawfully stand for trial at such term, for the reason that the court would not, under the circumstances, acquire jurisdiction over the person of the appellee, and the hearing or trial of the cause would necessarily be continued, by operation of law, until the next term of court. It is manifest then, we think, that when the situation or condition of affairs in regard to appeals from boards of commissioners as such situation or condition existed, under the laws in force at the time of the passage of the act of 1875, is considered, the meaning intended to be conveyed by the legislature in the use of the words "the next term of court, \* \* \* at which such cause might be lawfully tried" becomes obvious. That the next term of court meant and intended by the legislature was a term of the court to which the appeal had been taken, and which term commenced ten days after the transcript of the proceedings before the board had been filed with the clerk of the court, and a summons, if necessary, also served on the applicant or appellee ten days prior to the beginning of such term. In reason it appears that the legislature by the use of these words intended and meant the first term of the court at which complete jurisdiction, under the law, over the parties to such appeal would be acquired, and that thereby, the court, at such term, might lawfully hear and determine such cause. In the light of all of the circumstances this is the only reasonable interpretation that can be suggested or given to the provision in dispute. It cannot in reason be asserted that the legislature meant and intended that any or all changes of venue, continuances, and motions by which either party might delay the trial of the cause, or



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indefinitely prolong the pendency of the appeal, should be taken into consideration in determining when the case might be lawfully tried on appeal. Such a construction of the law would lead to an absurdity.

It is finally insisted that the legislature by the latter part of the proviso, namely, "he shall not be liable as a seller without license for sales made during the pendency of such appeal, but he shall be liable for the violations of any of the provisions of this act during such time, the same as if regularly licensed", meant and intended that the licensee should be protected by the license granted to him by the board, for all sales made thereunder, during the year after the issuing of such license, regardless of the fact of the pendency of the appeal. We can not sanction this contention for to do so would virtually impute absurdity to the action of the legislature. To hold that that body had first limited the time during which the operation of the board's order and the right of the licensee, under the license granted, should not be suspended or vacated by the appeal, and then in the next breath it in effect declared that the appeal in no wise should operate to suspend his right to sell under such license, would certainly render the statute absurd and contradictory. Such a construction a court will not adopt. *Mayor v. Weems*, 5 Ind. 547; *Storms v. Stevens*, 104 Ind. 46; *Stout v. Board, etc.*, 107 Ind. 343.

What the legislature intended by the language in question was to emphasize its will as declared in the preceding part of the proviso, namely, that the appeal should not be held to estop the licensee in the exercise of his rights under the license, until the end of the time designated. The phrase "he shall not be liable for sales made during the pendency of such appeal", under the circumstances, was intended to refer to its pendency during the particular limit which the licensee was authorized to exercise his right under his license. This limit of time begins to run from the time the license is granted by the board and terminates at the close



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of the term of court during which the cause may be lawfully tried. A well settled rule of construction affirms that where words of a particular description in a statute are followed by general words that are not as specific and limited as those preceding them, such general words are to be construed as referring to or applying to persons, cases, or things of like kind to those designated or intended by the particular words. *Nichols v. State*, 127 Ind. 406, and authorities cited.

The proviso upon its face certainly discloses that it was not the purpose of the legislature entirely to abrogate the rule affirmed by this court, to the effect that an appeal from the decision of the board of commissioners granting a license operated to vacate or suspend all rights of the applicant thereunder. The legislative purpose was only to modify such rule to the extent as hereinafter stated. An act of the legislature, approved March 9, 1889 (Acts 1889, p. 288), §5315a Horner 1897, provides that, "Whenever an applicant for, or remonstrant against, the granting of license to sell at retail spirituous, vinous or malt liquors, shall feel aggrieved by the decision of the board of county commissioners in granting or refusing such license, such applicant or remonstrant may appeal from said decision to the circuit court of the county, at any time within ten days thereafter, upon the execution of an undertaking, with sufficient surety, to pay all costs that may be adjudged against such person or persons, upon the final decision of said cause. Such undertaking shall be subject to the approval of the county auditor; and no appeal shall be granted unless said undertaking be filed within the time allowed herein for such appeal." Another act by the same legislature, approved also on March 9, 1889 (Acts 1889, p. 255), §525 Burns 1901, provides as follows: "That all proceedings and all actions, civil or criminal, taken or removed by appeal, change of venue, or in any other manner to any circuit, criminal or superior court, shall, if the papers or transcript in said proceedings or action are filed in vacation in the

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office of the clerk of said court, stand for issue and trial at the first term of said court thereafter. And if the papers or transcript in said proceedings or action are filed in said court, or in the office of the clerk thereof during term time of said court, the same shall stand for issue and trial at said term after the expiration of ten days from the day the same were filed."

Under the provisions of the act first above mentioned, the right to appeal to the circuit court by a remonstrator from an order of the board granting a license to sell intoxicating liquors is expressly granted, and the time for taking such appeal is reduced from thirty to ten days. This act may be considered as supplemental to and as forming a part of our present law pertaining to licensing the sale of intoxicating liquors. The latter act fixes the time when all cases or proceedings either civil or criminal removed by appeal to the circuit or criminal court shall stand for issue and trial. Such appealed cause under this act stands for issue and trial, (1) at the ensuing term of court when the transcript shall have been filed in vacation in the office of the clerk of the court at any time previous to the commencement of such term; (2) after the expiration of ten days from the date of filing such transcript when the same is filed in term time. This act repeals, by implication, §§5775, 5776 R. S. 1881 and Horner 1897, heretofore referred to, and which, as previously stated, formerly controlled appeals from boards of commissioners to the circuit court. Since the enactment of the latter act of 1889, the summons required to be issued and served on the appellee as provided by the above sections is no longer required. Consequently as the law now stands, if a remonstrator appeals from the order of the board granting a license, he must take his appeal within ten days from the time the decision is rendered, and such appeal may be lawfully tried by the court to which it is appealed at the term next following the filing of the transcript with the clerk in vacation. Or if the transcript is filed in term time

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then such cause may be lawfully tried at such term after the expiration of ten days from the date of filing the transcript. It would seem to follow then that an applicant to whom a license had been granted by the board of commissioners to sell intoxicating liquors would not be estopped by virtue of an appeal, by remonstrators, to the circuit court, in the exercise of his rights under his license, until the close of the term of court at which jurisdiction was acquired by the court over his person, by reason of the filing of the transcript, as provided by the act of 1889, that being the term at which the cause might be lawfully tried. To this extent and to this only it may be said that the legislature intended to modify the rule in regard to the suspension of the order by reason of an appeal taken to the circuit court by a remonstrator. At the close of such term, however, his rights, under the order of the board and the license issued thereon to him, would terminate by virtue of the appeal, and thereafter all sales assumed to be made by him under the license would be unlawful. If the applicant does not choose to wait for the lapse of the ten days allowed for an appeal, in case there has been a remonstrance, but takes out his license before the expiration of this limit, he places himself in an attitude of losing the license fee paid by him, in the event an appeal is taken by the remonstrators, and successfully prosecuted in the circuit court. Again, if he takes out the license awarded him by the board, and the remonstrators appeal from the order to the circuit court, and the latter court upon hearing the cause awards the applicant a license, his right to sell intoxicating liquors will depend on the license granted by the circuit court on appeal, and not upon the license granted him by the order of the board of commissioners from which the appeal was prosecuted. *Keiser v. State*, 78 Ind. 430; *Board, etc., v. Kreuger*, 88 Ind. 231.

If he takes out his license before the expiration of the appeal limit, he receives it subject to the rights of the remonstrators to appeal within such limit and also subject to the effects of such appeal.

In the decision of this cause we are not confined or controlled by the fact that the appeal from the order of the board granting appellee herein a license might have been, under the law, as we construe it, lawfully tried at the November term, 1899, of the Hamilton Circuit Court, as the sale of the liquor for which appellee was prosecuted was made by him on July 14, 1900, that date being long after the close of the February term, 1900, of the Hamilton Circuit Court, the latter term being the next after the November term of 1899. There is no contention but what the cause might have been lawfully tried at the February term, 1900, within the meaning of the proviso as herein construed. What is said in *Kirsch v. Braun*, 153 Ind. 247, on page 263 of the opinion, which might lead to an inference that §7862 Burns 1901, §5775 Horner 1897, is still in force, was said through inadvertence, without any consideration of the fact that that section was repealed by the act of 1889, *supra*. It follows, and we so conclude, that the trial court erred in its charge to the jury, and this appeal is therefore sustained at appellee's cost.

### KEITH v. THE STATE.

[No. 19,655. Filed November 1, 1901.]

**CRIMINAL LAW.—Appeal.—Evidence.—Murder.**—The rule that the Supreme Court will not weigh the evidence applies to capital cases. *p. 383.*

**SAME.—Appeal.—Evidence.—Murder.**—Where, in a trial for murder, much of the evidence tending to establish the most incriminating circumstances was strongly controverted, it was for the jury to decide what facts and circumstances were proved beyond a reasonable doubt, and for them too to draw the inferences deducible therefrom, and if the inference of guilt was fairly to be drawn from the circumstances of which there was evidence, the Supreme Court should accept the findings of the jury, approved by the trial court, although other inferences might be drawn from the circumstances in evidence. *p. 383.*

**SAME.—Venue.—Murder.**—A verdict finding defendant guilty of murder will not be reversed because of failure of proof of venue, the indictment having been returned in a county other than the one in

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which the dead body was found, where the probative force of the circumstances in evidence was to the effect that defendant killed deceased in the county in which the indictment was returned and cast her body in a well, and afterward removed it to a creek in the county in which it was found. *p. 383.*

**CRIMINAL LAW.—Murder.—Identity of Dead Body.**—Where, in a trial for murder, the body of the deceased was not found for several weeks after her death, it was proper to permit the father and other witnesses to testify as to the identity of the body. *pp. 383, 384.*

**SAME.—Misconduct of Jury.—Evidence.**—A verdict convicting defendant of murder will not be disturbed on appeal because of the alleged misconduct of three jurors who concealed the fact on their *voir dire* that they had formed and expressed an opinion as to defendant's guilt, where the trial court heard affidavits and oral testimony pro and con and overruled a motion for a new trial. *pp. 384, 385.*

**SAME.—Evidence.—Stenographer's Notes of Evidence before Grand Jury.**—A stenographer who took the testimony of witnesses before the grand jury that indicted defendant for murder may testify and read her shorthand notes at the trial. *p. 385.*

**SAME.—Evidence.—Threats of Third Persons.**—In the trial for the murder of a girl the court properly rejected the testimony of a witness that such witness was to marry the girl two days after the alleged murder was committed, and that on that day he was searching for her with threats to kill her if she did not marry him, where there was neither proof nor offer of proof of any overt act of the witness against the life of the girl. *p. 385.*

**SAME.—Evidence.—Irrelevancy.**—In a trial for murder the testimony of a witness that on a certain night about a month after the alleged murder, but before the body of the murdered girl was found, he heard blows, and a woman's voice begging some one not to strike her, coupled with an offer to prove that defendant was not present at that time or place, was properly rejected. *pp. 385, 386.*

**SAME.—Trial.—Instructions as to Admissions and Confessions.**—Where, in a trial for murder, evidence was introduced as to admissions and confessions made by defendant, the court properly refused an instruction embodying the reasons given in §214 of Greenleaf on Evidence why admissions and confessions are to be received with great caution, since some confessions are entitled to little credit, and others, deliberately made, are entitled to great weight, and the court cannot properly charge as a matter of law that the confessions in evidence belong to one class or the other. *p. 386.*

**SAME.—Murder.—Death Penalty.—Statutes.—Common Law.**—Section 1941 Burns 1894 provided that sentences of death pronounced in counties south of a named line should be executed by the warden at the prison at Jeffersonville. By the act of 1897 (Acts 1897, p. 69),

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the name of the Jeffersonville prison was changed to the "Indiana Reformatory," and the officer in charge from "warden" to "superintendent." *Held*, that if the failure of the act of 1897 to prescribe when, where, how, and by whom death sentences should be executed impliedly repealed that part of §1941 Burns 1894 which named the time, place, manner and officer, the death penalty for murder as provided by the penal code would not be thereby abrogated, but would merely leave the court free to follow the common law in directing the execution of a sentence. *pp. 386-389.*

**CRIMINAL LAW.—Murder.—Death Penalty.—Amendment of Statute After Verdict.—Ex Post Facto Law.—New Trial.—Modification of Judgment.**—Section 1941 Burns 1894 provided that sentences of death pronounced in counties south of a certain line should be executed at the Jeffersonville prison. The act of 1897 changed the name of the Jeffersonville prison to "Indiana Reformatory" without making any provision for executing death sentences in such counties. On January 11, 1901, defendant was convicted of murder in the first degree, the verdict assessing the death penalty. On January 28, 1901, a statute came into effect which provided that all death sentences thereafter pronounced should be executed at the Michigan City prison. The court thereafter pronounced judgment directing that the sentence be executed in accordance with the act of 1901. *Held*, that defendant's motion for a new trial did not raise the question as to whether the act of 1901 was *ex post facto*, but that such question should have been saved by motion to modify the judgment. *pp. 386-389.*

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Joseph D. Keith was convicted of murder, and appeals. *Affirmed.*

*F. B. Posey, D. Q. Chappell* and *C. W. Armstrong*, for appellant.

*W. L. Taylor*, Attorney-General, *C. C. Hadley, Merrill Moores* and *T. W. Lindsey*, for State.

**BAKER, J.**—Appellant is under sentence of death for murder. The only assignment presented in briefs and oral argument is that the court erred in denying appellant's motion for a new trial.

The sufficiency of the evidence to sustain the verdict is questioned. The State produced witnesses whose testimony

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went to establish these facts and circumstances: In the autumn of 1899, appellant, a farmer in Warrick county, about forty years old, married, living with his wife and children, began a liaison with the deceased, Nora Kifer, daughter of a neighboring farmer, about eighteen years old, unmarried. In December they lived together two or three days at a hotel in Evansville, in Vanderburgh county, some twenty miles from appellant's home. From this time until April following, deceased stayed mainly in Evansville, sometimes in a brothel. During this period appellant paid out considerable money to her and on her account. Deceased was not discreet, and her intimacy with appellant became current gossip in the home neighborhood. It reached the ears of appellant's wife and caused trouble. Appellant also became fearful of a threatened action by deceased for her seduction. On Saturday evening, March 31st, deceased returned home from Evansville. On Monday appellant sought to see her, but failed. On Tuesday appellant sent her a note by his son Jesse, a lad in his teens. She destroyed the note, but, from the testimony of Jesse who helped deceased decipher it and from subsequent declarations of appellant, it read: "Lora, meet me at the bridge at dark." Deceased instructed the lad to tell his father "All right." In the late afternoon she donned her best clothes, rather gaudy and easily described, and started for the bridge. (This bridge crosses an old canal in a valley where darkness falls rapidly after the sun descends behind the adjacent hills.) She was seen to reach and pace back and forth upon the bridge at dusk. She did not leave either east or west along the road. South of the bridge is a wood. Adjoining this is a field in which, near the fence, lies an abandoned well, full of water to within a few feet of the surface, fenced off from the field with rails, overgrown with briars and bushes. That night of Tuesday, April 3rd, was the last time that Nora Kifer was seen alive. About eleven o'clock that night neighbor Hedges saw appellant approach-



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ing his home along the road leading from the direction of the bridge and old well. Upon seeing Hedges appellant stepped from the middle of the road over to the fence. This was of pickets about four feet high. Appellant failed to climb over, but skirted along the fence, with averted gaze, until he had passed Hedges. Hedges accosted appellant, but he neither replied nor looked up. April 9th the mother of deceased received a letter, postmarked at Evansville on April 8th, reading: "Dear Mother: I start this Evening for Schicago ona trip. I May be gone three months and mite Six With a friend. I expect To have a fine Trip. Do not be uneasy about me. From your Dauter, Lora." Appellant was accustomed to call deceased "Lora". The writing of the letter and envelope was identified as appellant's. From this time until May 22nd appellant spoke to nearly every one he met about the Kifers' receiving letters from their daughter, that she was in a sporting-house either at Evansville or Paducah or St. Louis, and that if she told lies on people around Evansville like she had on him she would be found in the creek with a stone around her neck. Finally the father of deceased said to appellant that Nora had not been heard from; that a letter, purporting to be from her, had been received, but that it was in a man's handwriting; that plenty of men would swear whose writing it was; and that he proposed to search for his daughter and find her if alive. On the night of May 22nd William Blackman was returning from Evansville. About five miles from the canal bridge, about an hour after dark, he met a covered buggy, top up, side curtains on, back curtain down, drawn by a gray horse, proceeding toward Evansville. The horse was "just flying", swerved wide in passing Blackman, and never slackened speed so far as he could hear it. About 10 o'clock that night appellant arrived at a livery barn in Evansville. He drove a gray mare, harnessed to a top buggy. At 6 o'clock the next morning he had breakfast and shortly afterwards left Evansville. That morning the body



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of a woman was found in Pigeon creek, about two miles from Evansville, at the side of a bridge on the road leading towards the canal bridge and appellant's home. The body was near the middle of the creek in about four feet of water. The head and upper part of the body were submerged. The legs and lower part of the abdomen were out of the water. Around the neck was a rope, to which was attached a heavy stone. The stream was sluggish. The skull was found to be mashed in, particularly about the temples. The body appeared to have been dead from six to eight weeks and to have been submerged in water during that time. The hair and nails had all slipped off. The clothing on the body was that worn by Nora Kifer when she left home on April 3rd. (The slippers and some other articles were not on the body.) A birthmark and other physical characteristics were those of Nora Kifer. The father and others identified the deceased as Nora Kifer. That day appellant painted his buggy and washed the floor carpet thereof. Blood crystals were found in the carpet. An autopsy disclosed that the blood was yet fluid in the body. On the 25th appellant was arrested at his home in Warrick county and taken to Evansville. The officers permitted him to ride separately with his son Jesse. He told Jesse that if he was asked about the note he should say that he did not take any note. At the jail he was searched and a pair of cast iron knuckles were found on him. After giving forth many conflicting oral declarations, he made and signed a written statement to the effect that deceased had caused him so much trouble that he wanted to get her out of the way; that he sent the note making the appointment at the bridge to enable a peddler whom he had employed for that purpose to take her to Chicago; that the peddler returned and said he had taken her to Chicago; that he wrote the letter of April 8th to quiet her parents. The officers arrested a peddler answering the description given by appellant. When the peddler was brought into appellant's presence, he said "That is the

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man". On the peddler's fearfully beseeching him not to accuse an innocent man of the crime, appellant laughed and said "You are not the man. I have wronged you". Appellant then told the officers that he had employed a man named Asbury to take deceased away. The officers replied that it was futile to try to deceive them further, that they had had a talk with his son Jesse, and that he was the man. Whereupon appellant replied "You need not look for outsiders any longer. If you will wait till to-morrow morning, after I have seen my wife, I will tell you who did it, where it was done, and all about it." In the morning, after consulting counsel, he refused to talk further. An aged aunt visited him in jail, and said: "If you are guilty, Joe, own it like a man and get the mercy of the court, but if you are not guilty, say so like a man." He replied: "She broke my peace at home and was getting away with all my money, and something had to be done." While in jail appellant attempted to arrange with fellow prisoners, and with other persons by letter, for proof of an alibi for himself and of the life and whereabouts of Nora Kifer after April 3rd. In the latter part of June some men were cutting wheat in the field between the old well and the highway leading to appellant's home. Two slippers were found, one about twenty-five yards and the other about seventy-five yards from the old well, now rainsoaked and muddy, which were identified as those worn by Nora Kifer on the evening of April 3rd. There were blood crystals on the rails about the well. After the water was bailed out, at the bottom were discovered a hammer, a pair of grab-hooks, which had been made by appellant and used about his farm, and human hair of the color, length and quantity Nora Kifer had when last seen alive. Against this proof on the part of the State, appellant introduced evidence that he was at home the entire evening and night of April 3rd. As a witness in his own behalf, he denied practically all of the admissions and circumstances adduced by the State. Much of the State's evidence tending

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to establish the most incriminating circumstances was strongly controverted. But counsel are in error in assuming that, because this is a capital case, a court of review will undertake to weigh the evidence. No more in this than in any other case does the transcript bring up the voice, the appearance, the demeanor of the witnesses, including appellant; and these are matters that may have been controlling with the jury and trial court in determining the weight of the evidence and the credibility of the witnesses. It was for the jury to decide what facts and circumstances were proved beyond a reasonable doubt, and for them too to draw the inferences deducible therefrom; and if the inference of guilt was fairly to be drawn from the circumstances of which there was evidence, the appellate tribunal should accept the finding of the jury, approved by the trial court, although other inferences might be drawn from the circumstances in evidence. *Lee v. State*, 156 Ind. 541. Our opinion is that the verdict should not be disturbed on account of the alleged insufficiency of the evidence to sustain it.

Appellant argues separately that the venue was not proved. This is really a part of the question whether the evidence sustains the verdict. The venue, like other material averments of the indictment, must be proved beyond a reasonable doubt. The indictment was returned by the grand jury of Warrick county. The dead body was found in Vanderburgh county. From the latter fact, taken by itself, the presumption would be that the murder was committed in Vanderburgh county. But the probative force of the circumstances in evidence was to the effect that appellant slew deceased in Warrick county near the canal bridge on the night of April 3rd and cast her body into the well, where it lay until the night of May 22nd, when appellant removed it to Pigeon creek in Vanderburgh county.

Complaint is made of the court's ruling in permitting the father of deceased and other witnesses to testify that the body found in Pigeon creek was that of Nora Kifer. Coun-

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sel contend that, if a dead body is mutilated or decomposed beyond recognition, the law forbids the witness to state whose body it is, and permits only a description of the similarities between the dead body and the person in life, requiring the jury to decide the question of identity. Identity may be a matter of opinion; if so, then too is the question whether a body is recognizable or not. To certain schools of metaphysicians the whole external universe may be an appearance merely, nothing real, nothing a fact. But the testimony of witnesses that appellant did this or that, the law accepts as statements of fact, and is compelled to, else enter an inextricable maze. Yet it may have been a case of mistaken identity or hallucination. Who was it that waited on the canal bridge at dusk on April 3rd? The witnesses were properly allowed to answer, Nora Kifer. Whose dead body was found in Pigeon creek? The hair and nails were gone; the skull fractured in many places; the eyes very deeply sunken; the nose somewhat mutilated; the flesh somewhat decomposed; the skin somewhat discolored. But there was the whole body; contour, size, age; shape of head and face; tapering fingers, double ankles, birthmark, a certain front tooth decayed; beyond all, that indefinable impression produced by the ensemble. To those witnesses, parent, relative, neighbor, there was no inability to recognize; on the contrary, they answered, and were properly permitted to answer, Nora Kifer's. The full purposes of justice were subserved, and all the elements of the problem brought before the jury, by allowing in each instance, concerning the dead body in Pigeon creek as well as the live body on the canal bridge, the widest cross-examination as to the reasons why the witnesses so answered. There was no error in the ruling. Wharton's Crim. Law (7th ed.), p. 747; 3 Greenleaf's Ev. (16th ed.), §133.

It is alleged that appellant did not have a fair and impartial trial by reason of misconduct of three jurors in this, that each had formed and expressed an opinion of appel-

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lant's guilt and concealed the fact on his *voir dire* examination. This was disputed by the State. The trial court heard affidavits and oral testimony pro and con. We are not authorized to disturb its finding on conflicting evidence. *Hinshaw v. State*, 147 Ind. 334; *Hauk v. State*, 148 Ind. 238.

Appellant's objections to the court's action in permitting a stenographer to testify and to read her shorthand notes regarding the testimony of certain witnesses before the grand jury, are fully covered by the decision in *Higgins v. State*, 157 Ind. 57.

William Clark, a witness for appellant, was not permitted to testify that he was to marry deceased on April 5th and that on that day he was searching for her with threats to kill her if she did not marry him. There was neither proof nor offer of any overt act by Clark against the life of Nora Kifer. Evidence of isolated threats by third parties is not admissible. *Bonsall v. State*, 35 Ind. 460; *Jones v. State*, 64 Ind. 473; *Walker v. State*, 102 Ind. 502; *Davidson v. State*, 135 Ind. 254; *Siple v. State*, 154 Ind. 647; *Green v. State*, 154 Ind. 655.

Appellant offered to prove by Union Henon that, about May 1, 1900, at 9 o'clock at night, while he was on a highway four or five miles north of the Keith and Kifer neighborhood, he heard blows and a woman's voice begging some one not to strike or kill her, the sounds apparently coming from a place about seventy yards away. This was coupled with an offer to prove that appellant was not present at that time and place. If the prosecution fails to make a case, the defendant is not required to introduce any evidence. If the State makes a *prima facie* case, the defense is not limited to controverting the facts and circumstances proved by the State, but may bring forward any legitimate evidence to meet or throw doubt upon the State's case, including proof that another than the defendant committed

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the crime under investigation. *Green v. State*, 154 Ind. 655. But proof of an assault at another time and place upon some person other than the deceased is irrelevant. The evidence on the part of the State pointed to no other time and place than April 3rd and the vicinity of the old canal bridge. This was what the jury had to believe in order to find appellant guilty under the evidence. But, on the part of appellant, there was neither proof nor offer that Nora Kifer was alive and in the neighborhood of the alleged assault on the night of May 1st. We do not find the case of *Synon v. People*, 188 Ill. 609, 59 N. E. 508, to be applicable to the facts here.

The court properly refused an instruction submitted by appellant in which were embodied the reasons given in section 214 of Greenleaf why "admissions and confessions are to be received with great caution". The weight and the credibility of the evidence of confessions in a given case are to be determined by the jury as facts. Some admissions or confessions may be entitled to little credit owing to confusion of the prisoner and the heedlessness or worse of the narrator. Other confessions, deliberately made, as Greenleaf says in section 215, "are among the most effectual proofs in the law". But the court can not properly charge as a matter of law that the confessions in evidence belong to the one class or the other. *Garfield v. State*, 74 Ind. 60; *Davis v. Hardy*, 76 Ind. 272; *Unruh v. State, ex rel.*, 105 Ind. 117; *Mauro v. Platt*, 62 Ill. 450; *Commonwealth v. Galligan*, 113 Mass. 202; *Castleman v. Sherry*, 42 Tex. 59.

Lastly, appellant challenges the correctness of this instruction: "If you find the defendant guilty of murder in the first degree as charged in the indictment, you have the right to fix his punishment at imprisonment for life or that he suffer death." From the organization of the Northwest Territory down to 1881, the penalty in this jurisdiction for murder in the first degree was death. Since 1881 the jury has had a discretion to fix the punishment at death or im-

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prisonment in the state prison during life. Throughout the whole period of Indiana's existence as Territory and State, the death penalty has been named in the statute defining murder in the first degree; and the common law has been in force except as modified by constitutions and statutes. As appellant's punishment was not fixed at imprisonment, his complaint is necessarily limited to that part of the charge which informed the jury that they might assess the death penalty. The charge was correct, unless capital punishment in this State has been abolished by implication. Prior to 1897 there was a state prison south located at Jeffersonville and a state prison north located at Michigan City. In 1889 a statute was passed directing that sentences of death pronounced in counties south of a named line should be executed at the Jeffersonville and those north at the Michigan City prison. §1941 Burns 1894. Under this statute appellant should suffer death at the Jeffersonville prison. But in 1897, the name of the southern prison was changed to "The Indiana Reformatory" and the title of the officer in charge from "warden" to "superintendent". So far as imprisonment was concerned, the purpose of the institution was changed from the incarceration of male felons generally to that of those who were more than sixteen and less than thirty years old. Male felons over thirty years old were to serve their time at the northern prison, the name of which was changed to "The Indiana State Prison". Acts 1897, p. 69. The act of 1897 made no mention of the execution of death sentences. This was the state of the statutory law when the verdict in this case was returned on January 11, 1901, finding appellant guilty and assessing the death penalty. On January 28, 1901, a statute came into effect which provided that all sentences of death thereafter pronounced should be executed at the Michigan City prison. Acts 1901, p. 4. The court thereafter pronounced judgment and directed that the sentence be executed according to the provisions of the act of 1901. Appellant argues that, as to



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him, the act of 1901 is an *ex post facto* law, and that the act of 1897 repealed the act of 1889 which prescribed when, where, how, and by whom death sentences should be executed. But the assignment is that the court erred in overruling the motion for a new trial. The motion sets forth various alleged "errors occurring at the trial". The particular ground to which the argument is addressed is that the court erroneously instructed the jury that they might fix appellant's punishment at death. The instruction was given, the trial concluded, and the verdict returned, before the act of 1901 was passed. The only question under the motion, therefore, was and is whether that part of the penal code which defines murder in the first degree and fixes the punishment at death was in force when the instruction was given. It is unnecessary to decide whether or not the failure of the act of 1897 to prescribe when, where, how and by whom death sentences should be executed, impliedly repealed that part of the act of 1889 which did name the time, place, manner and officer, because the express repeal of all legislation touching time, place, manner and officer would not abrogate the death penalty for murder, but would merely leave the court free to follow the common law in directing the execution of the sentence. Down to 1807, our statutes were silent respecting time, place, manner and officer. Laws of Northwest Territory, 1787-1802, ch. VI, §2, p. 98. The court issued its writ and the sheriff executed it. From 1807 to 1824, nothing was prescribed but the manner (hanging by the neck until dead), which was a mere affirmation of the common law method previously employed. R. S. Ind. Ter. 1807, ch. VI, §29, p. 39. In 1824 and 1831, the time was fixed, but no officer nor place was named. R. S. 1824, §65, p. 149; R. S. 1838, §76, p. 219. In 1843 (R. S. 1843, §70, p. 997), the sheriff was named. He was the proper officer by the common law. In 1852 (2 R. S. 1852, §134, p. 379) the place and the persons entitled to be present were named for the first time. In 1881 (§§1872,



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1875 R. S. 1881), some changes were made in time and place. Then followed the legislation of 1889, 1897, and 1901, heretofore referred to. Just as, starting from none, the details of method have been built up, so they might be taken down, one by one, or collectively, without affecting the definition of murder and the infliction of the death penalty therefor. There was no error in overruling the motion for a new trial.

Since the oral argument and after the cause had been taken under advisement, appellant's counsel, probably having perceived that their attacks upon the law of 1901 and the part of the judgment which directs when, where, how and by whom the penalty shall be inflicted had not been duly presented to the trial court or here, have asked leave to file additional assignments of error with a view to having a basis for their attacks. At least two reasons forbid the granting of the request. The application comes too late. And there is nothing in the record on which to found the proposed assignments. The part of the judgment which sentences appellant to death is affirmatively approved. Appellant therefore can not successfully assail the judgment as an entirety. Having failed to move for a modification of the judgment with regard to the details of executing the sentence, appellant is unable to point out any ruling of the trial court on that subject for review.

Appellant procured a change of venue from the Warrick to the Gibson Circuit Court. The unusually voluminous record discloses that the trial was conducted with great care, zeal and ability by the respective counsel. A conservative and painstaking judge, who saw the witnesses face to face, pronounced the sentence, and no valid reason has been advanced why it should not stand.

Judgment affirmed.

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Town of Rosedale v. Hanner.

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**TOWN OF ROSEDALE v. HANNER.**

[No. 19,611. Filed November 12, 1901.]

**MUNICIPAL CORPORATIONS.—Ordinance Prohibiting the Use of Gates Swinging Outward.—Statutes.**—A town ordinance prohibiting the construction or use of gates that open or swing out upon the sidewalk is not invalid under §1709 Burns 1901, forbidding any incorporated town or city from making punishable any act declared by statute to constitute a public offense against the State on the ground that the act made penal by the ordinance is a misdemeanor, under §2048 Burns 1901, concerning the obstruction of highways, since the ordinance is preventive of the act declared by the statute to constitute a public offense. *pp. 390, 391.*

**SAME.—Ordinances.—Gates Swinging Outward.**—A town ordinance prohibiting the construction or use of gates that swing outward upon the sidewalk is reasonable and clearly within the power vested in incorporated towns by clauses 6, 11, §4357 Burns 1901. *pp. 391, 392.*

From Parke Circuit Court; *A. F. White*, Judge.

Action by town of Rosedale against James M. Hanner for violation of town ordinance. From a judgment for defendant, plaintiff appeals. *Reversed.*

*J. M. Johns*, for appellant.

*Dick Miller, J. T. Johnston* and *J. S. White*, for appellee.

**HADLEY, J.**—The appellant filed a verified complaint before a justice of the peace, charging appellee with the violation of an ordinance of appellant, which reads as follows, omitting the caption: "Section 1. Be it ordained by the board of trustees of the town of Rosedale, Parke county and State of Indiana, that it shall be unlawful for any person or persons owning or controlling property in the incorporated village of Rosedale, Parke county and State of Indiana to hang, hinge, construct, or erect any gate or gates or continue the usage of any gate or gates that open or swing out upon any street or sidewalk after the 5th day of July, 1897. Section 2. Any person or persons violating the provisions of the foregoing section shall upon conviction thereof

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be fined in any sum not less than \$5 nor more than \$10 for each and every offense and costs of prosecution may be added."

The circuit court upon appeal thereto sustained a demurrer to the complaint. Appellant declining to amend, judgment was rendered against it. The only objection made to the complaint is that the act made penal by the ordinance is a misdemeanor by a statute of this State (§2043 Burns 1901, §1964 Horner 1897, relating to the obstructions of highways) which fact it is assumed renders the ordinance void under §1709 Burns 1901, §1640 Horner 1897, forbidding any incorporated town or city from making punishable any act declared by statute to constitute a public offense against the State.

Concerning the obstruction of public highways the statute is: "Whoever, in any manner, wrongfully obstructs any public highway" shall be fined, etc. The punishable offense defined in the ordinance is the hanging, hinging, or construction of a gate, or the continued use of a gate, that opens or swings out upon a street or sidewalk. The act forbidden is the erection or continued use of a gate so constructed as to be easily susceptible of swinging out upon and obstructing the sidewalk. In its nature the ordinance is preventive of the act declared by the statute to constitute a public offense. The ordinance is directed against the creation, or permissive continuance, of conditions that threaten the obstruction of a highway, while §2043 Burns 1901 of the statute is directed against the accomplished act of obstruction. The act made penal by the ordinance in question is not punishable by the statute relating to the obstruction of highways, or by any other statute of the State to which our attention has been called, and the validity of the ordinance, therefore, is not affected by §1709, *supra*. *Zeller v. City of Crawfordsville*, 90 Ind. 262.

There is no doubt of the power of an incorporated town to provide by ordinance reasonable regulations for the health

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and safety of its inhabitants, and for the free and uninterrupted use of its streets and alleys. §4857 Burns 1901 (cl. 6 and 11); *City of Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, 30 Am. St. 214.

That gates constructed to swing outward are liable to be left standing out upon the sidewalk, by inadvertence, playing children, unusual storms, and other agencies against which it is difficult to guard, and when so standing, particularly in the night-time, are sources of great annoyance and often of severe injury to travelers on the sidewalk, is a matter within the common experience of all dwellers in villages and towns. The restriction imposed by the ordinance before us is easily complied with, is effective in removing a fruitful source of danger to foot travelers in the town, and is therefore reasonable, and clearly within the power vested in appellant. The complaint is sufficient, and the demurrer thereto should have been overruled.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

LEEDS v. DEFREES.

[No. 19,572. Filed November 18, 1901.]

MUNICIPAL CORPORATIONS. — *Street Improvements. — Foreclosure of Lien.—Complaint.*—A complaint to foreclose a street improvement assessment, making a copy of the assessment roll relating to defendant's assessment a part thereof by exhibit, and disclosing that the municipal authorities performed or caused to be performed all the material acts required by the statute to create the lien is sufficient, without making copies of all resolutions, ordinances and orders adopted by the common council in the proceeding exhibits. p. 394.

SAME. — *Street Improvement Assessments.—Presumptions.*—It will be presumed in the absence of any opposing facts that the council in adopting the estimate of a street improvement assessment prepared by the city civil engineer considered it as a *prima facie* true and correct assessment by which the entire cost of the improvement was apportioned to each parcel of the abutting property according to the benefits derived by such property by reason of the street improvement, and such assessment must be deemed to be valid when assailed in a collateral proceeding. p. 395.

157	392
f157	408
157	412
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158	94
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158	208
158	530
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161	374
161	376
162	513
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163	604
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157	392
168	425
168	426
168	427
168	428
157	392
f170	109

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**MUNICIPAL CORPORATIONS.—Street Improvement Assessments.—Hearing.—Adjustment of Assessments.**—Under §4294 Burns 1894, an aggrieved property owner may appear before the common council at the time fixed for hearing the engineer's report of a street improvement assessment and present his objections thereto, and the council has plenary power to adjust the assessments in accordance with the benefits received. *p. 396.*

**SAME.—Street Improvements.—Notice.—Hearing.—Due Process of Law.**—Under §4294 Burns 1894, an aggrieved property owner is given notice of the proposed assessment against his property, and awarded a hearing, consequently such owner is given his day in court, and it cannot be asserted that under this statute he is deprived of his property without due process of law. *p. 396.*

**SAME.—Street Improvements.—Personal Judgment.—Appeal and Error.**—Where in an action to foreclose a street improvement assessment, the court rendered a personal judgment against the defendant, in addition to the decree foreclosing the lien, and no objections to the form or character of the judgment or motion to modify the same were made, the cause cannot be reversed because of such error. *p. 398.*

From Laporte Superior Court; *H. B. Tuthill*, Judge.

Action by Colvert H. Defrees against Minnie Leeds to foreclose a street improvement assessment. From a judgment for plaintiff, defendant appeals. *Affirmed.*

*C. W. Smith* and *J. H. Gallaher*, for appellant.

*M. T. Krueger*, *C. R. Collins* and *J. B. Collins*, for appellee.

**JORDAN, J.**—Appellee as plaintiff below in a complaint of three paragraphs sought to foreclose a lien against three separate parcels of real estate. The lien in question was created by virtue of an assessment for the improvement of a certain public street in Michigan City. Appellant, having unsuccessfully demurred to each paragraph of the complaint, filed her answer, to which a demurrer was sustained. On refusal to plead further on her part a separate judgment on each paragraph of the complaint was rendered, that the plaintiff recover of the defendant the amount of the assessment due and unpaid, and a foreclosure of the lien against

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the real estate described in the complaint was decreed by the court. The errors discussed and relied upon for a reversal of the judgments are (1) overruling the demurrer to each paragraph of the complaint; (2) sustaining a demurrer to the answer, and (3) that the court erred in rendering a personal judgment for the amount of the lien against appellant. Three objections are urged against the complaint: (1) That it does not disclose the dimensions of the improvement as provided and fixed by the necessity resolution; (2) that a copy of the complete or entire assessment roll was not filed with and made a part of the complaint, and (3) that the pleading discloses that the assessment in question was made under and according to the front foot rule, without regard to actual benefits. A copy of the necessity resolution as adopted by the common council was not filed with the complaint. Neither did the law contemplate that it should be. The complaint recited the adoption of such resolution, etc., but was silent in respect to the dimensions of the improvement as designated or provided for by the resolution or ordinance. Such omission did not render the complaint insufficient on demurrer. It was not essential that the plaintiff in her complaint should go into all of the minute details leading up to the assessment in controversy. Plaintiff was not required to file as exhibits copies of all resolutions, ordinances, and orders adopted by the common council in the proceedings pertaining to the improvement. Each of the paragraphs of the complaint discloses that the municipal authorities performed or caused to be performed all of the material acts required by the statute necessary to create the lien, and a copy of the assessment roll, so far as the same related to and exhibited the assessment upon the property of appellant, was filed with and made a part of each of said paragraphs. This was sufficient. *Van Sickle v. Belknap*, 129 Ind. 558; *Cleveland, etc., R. Co. v. Jones Co.*, 20 Ind. App. 87; *Dugger v. Hicks*, 11 Ind. App. 374; *Sloan v. Faurot*, 11 Ind. App. 689.

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The complaint in respect to the question of assessment alleges that the civil engineer was directed by the common council to make a report, as provided by law, to that body, of a final estimate of the cost of said improvement. With this direction the engineer complied. The final estimate as reported to the council by him was by that body referred to a committee of five appointed to consider the same. At the time and place designated by the notices given as required by the statute, said committee met to consider the estimate and to hear objections thereto, and thereafter reported to the common council recommending the adoption of their report. The complaint then avers that "on the 13th day of November, 1899, the common council approved and adopted the said estimate, and ordered that it be an assessment against the said lots and parts of lots bordering on the improved part of said street." These averments do not support the contention of appellant that the assessment in controversy is illegal and void for the reasons urged by appellant that it is shown to "have been made arbitrarily by the front foot" without regard to the benefits resulting by reason of the improvement. The only legitimate conclusion which can be reasonably deduced from the alleged facts, in the absence of anything to the contrary, is that the estimate of the cost of the improvement and the apportionment of said costs to the abutting property as made and reported to the council by the engineer was accepted and adopted by that body. By the adoption of the assessment the council made it their own assessment, and it must be presumed, in the absence of any opposing facts, that the council, at least, considered it as a *prima facie* true and correct assessment, by which the entire cost of the improvement was apportioned to each parcel of abutting property according to the benefits derived by such property by reason of the street improvement. When tested by the holding of this court in *Adams v. City of Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. 484, such an assessment must be deemed to be valid when assailed

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in a collateral proceeding like this to enforce a recovery thereof. If appellant was not satisfied with the part of the costs apportioned to her property, she, as was her right under §4294 Burns 1901, ought to have appeared before the common council at the time fixed for the hearing of the engineer's report, and presented her objections thereto, and sought a hearing thereon. Such a hearing, we must presume, the common council would have accorded to her. That body, under §4294, *supra*, being §7 of the Barrett law as originally enacted, was the proper tribunal before which appellant might have appeared and contested the question as to whether or not the amount of the cost of the street assessment sought to be apportioned to her abutting property exceeded, under all the circumstances in the case, the amount of benefits received by such property on account of the improvement. In the event it was shown or established to the satisfaction of the common council that such sum exceeded the amount of the special benefits resulting to such property, the common council, under the provisions of the above section, was invested with plenary powers so to change or modify the proposed assessment as to make it conform, under all the circumstances, as near as possible to such resulting benefits. *Adams v. City of Shelbyville*, 154 Ind. 467.

An aggrieved property owner is, under this statute, duly notified of the probable or proposed assessment against his property, and is awarded a hearing before the common council, a tribunal which the legislature had the right and power to prescribe for that purpose, and one authorized to award adequate relief to the complaining owner in respect to the assessment against his property. Consequently in the eye of the law such owner is given his day in court, and it can not be asserted that, under this statute, he is deprived of his property without due process of law. *Kiser v. Town of Winchester*, 141 Ind. 694, and cases cited.

Appellant by her answer assails the constitutional validity of the statute upon which the improvement in question is



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based, and her counsel in their argument contend that the act is invalid for the reason that it provides no tribunal for assessing property for street improvements according to the benefits received; that it provides no tribunal authorized to determine in what manner or to what extent abutting property is benefited by the improvement. But in this contention appellant is mistaken. What we previously said in considering the objections of appellant in regard to the complaint fully meets and refutes her contention.

The statute in question, as shown, provides a tribunal for that purpose, and further provides that an aggrieved person shall have the right to appear before it and be accorded a hearing on his objections to the proposed assessment. The power to hear the complaint of the aggrieved owner carries with it such implied power as will make the hearing effectual; for the rule is well settled that when a general power is granted by a statute every necessary power for the effectual exercise thereof is given by implication. *Studabaker v. Studabaker*, 152 Ind. 89; *Conn v. Board, etc.*, 151 Ind. 517; *Satterwhite v. State*, 142 Ind. 1, and cases cited.

Possessing such general power under the statute, the council certainly had the right upon a hearing to award adequate and effectual relief by ultimately apportioning the cost of the improvement to the several pieces of property according to the benefits resulting to each on account of the improvement. It is true that the statute provides what may be considered as *prima facie* evidence of the benefits received by abutting property, but such standard or evidence is not conclusive, as the council has the right so to apportion the cost as to make it conform to the benefits derived.

We held in *Adams v. City of Shelbyville*, 154 Ind. 467, that the statute involved in this case, which is commonly known as the Barrett law, did not violate any of the provisions of the State or federal Constitution. This holding we have repeatedly affirmed, the last case being *Martin v. Wills, ante*, 153.

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Welch v. Town of Roanoke.

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We are again referred to the decision in the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, but the decision in that case as subsequently interpreted by the Supreme Court of the United States lends no support to appellant's contention that the statute in controversy violates the fourteenth amendment of the federal Constitution. See the decisions of that court collected and cited in *Martin v. Wills*, *supra*.

It is lastly insisted that the court erred in rendering a personal judgment against appellant in addition to the decree foreclosing the lien. In this contention we concur, but no objections to the form or character of the judgment or motion to modify the same were made in the trial court, hence, appellant is not in position to demand a reversal for this irregularity in respect to the judgment. *Cockrum v. West*, 122 Ind. 372; *Hormann v. Hartmetz*, 128 Ind. 353; *Heal v. Niagara Oil Co.*, 150 Ind. 483.

Finding no available error the judgment is in all things affirmed.

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WELCH v. TOWN OF ROANOKE.

[No. 19,852. Filed November 14, 1901.]

**MUNICIPAL CORPORATIONS.—Sewers.—Foreclosure of Assessments.—**

*Complaint.*—Section 4430 Burns 1901 provides that the appraisers appointed to assess the benefits in the construction of a sewer shall file the schedule thereof with the clerk of the board of town trustees who shall record the same, after which the assessments therein made shall become a lien on the lots specified. Section 4437 Burns 1901 provides that in an action to enforce the lien the presumption of law shall be that all provisions of the act have been complied with. *Held*, that such presumption does not render sufficient a complaint to enforce a sewer assessment lien which fails to aver that the schedule showing the benefits assessed against defendant's property was recorded in the records of the board of trustees. pp. 399-401.

**SAME.—Sewers.—Act of 1867 not Repealed by Act of 1889.**—The act of 1867 (§§4429-4443 Burns 1901) for the construction of sewers was not repealed by the act of 1889, known as the Barrett law, but said acts provide two separate and distinct systems for the construction of sewers by incorporated towns. p. 401.

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Welch v. Town of Roanoke.

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From Huntington Circuit Court; *C. W. Watkins*, Judge.

Action by town of Roanoke against Melissa Welch to enforce a sewer assessment. From a judgment for plaintiff, defendant appeals. *Reversed*.

*J. B. Kenner* and *U. S. Lesh*, for appellant.

*S. M. Sayler*, for appellee.

MONKS, C. J.—This action was brought by appellee to enforce a lien against real estate of appellant for the construction of a sewer, under the act of 1867 (Acts 1867, p. 205), being §§4429-4443 Burns 1901, §§3392-3406 R. S. 1881 and Horner 1897. The trial of said cause resulted in a judgment enforcing said lien.

Appellant first insists that the law under which said sewer was constructed is unconstitutional. This court held otherwise in *Kizer v. Town of Winchester*, 141 Ind. 694.

The court below overruled a demurrer for want of facts to the first paragraph of complaint, and overruled a motion to make the second paragraph more specific. The correctness of each of these rulings is challenged. It is provided in §4430 (3393), *supra*, that the appraisers appointed to assess the amount of benefits to each lot or part of lot "shall file said schedule with the clerk of the board of trustees of such town, who shall record the same in the records of said board of trustees; and from and after the recording of said schedule above directed, the assessments therein made shall be a lien upon the lots and parts of lots, respectively, against which they are made, to be in no manner divested only as hereinafter provided." It was not alleged in the first paragraph that the schedule of the real estate and the assessments thereto were ever recorded in the records of the board of trustees of the town of Roanoke as required by §4430 (3393), *supra*.

About a year after the action was commenced a second paragraph of complaint was filed which was the same as the first except that it contained an allegation that "said ap-

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Welch v. Town of Roanoke.

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praisement has been recorded in the records of said board of trustees."

Section 4437 (3400), *supra*, provides that in an action to enforce said lien "the presumption of law shall be that all the provisions of this act have been complied with; and that the only defense that the defendant shall be allowed to set up in said action shall be that he has paid the amount with which said lots or parts of lots are charged, and that said lots or parts of lots are not benefited to the amount assessed against the same." Appellee insists that under the provisions of said section "that neither the court below nor appellant could inquire as to whether the provision in regard to recording the schedule made by the appraisers was disregarded or complied with, but that the court must presume that the same had been complied with."

Under the act of 1867, being §§4429-4443 (3392-3406), *supra*, the assessment of benefits made by the appraisers is not a lien until the schedule provided for is recorded as required by §4430 (3393), *supra*. If no such record is made there is no lien. It is only after the assessment has become a lien under §4430 (3393), *supra*, that the lien can be enforced under §4437 (3400), *supra*. Unless facts are alleged in the complaint showing the recording of said schedule before the commencement of the action as required by said §4430 (3393), *supra*, no lien is shown and therefore no cause of action is stated. It is evident, therefore, that the provision in said §4437 (3400), *supra*, in regard to the presumption of law, does not render sufficient a complaint which fails to aver that the schedule showing the benefits assessed against appellant's real estate was recorded in the records of the board of trustees of the town of Roanoke before the commencement of the action. Appellee was not required to pursue the remedy provided by §§4435, 4436, (3390, 3399), *supra*, but had the right to enforce its lien, if any, under §4437 (3400), *supra*. *Martin v. Wills, ante*, 153.

The same question is presented as to the second para-

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graph of complaint by the motion to make that paragraph more specific. It follows that the court erred in overruling the demurrer to the first paragraph of complaint and in overruling the motion to make the second paragraph more specific. The act of 1867 (Acts 1867, p. 205), being §§4429-4443 (3392-3406), *supra*, was not repealed by the act of 1889, known as the Barrett law, but said acts provide two separate and distinct systems for the construction of sewers by incorporated towns. *Allen v. Town of Salem*, 10 Ind. App. 650, and cases cited. *Shrum v. Town of Salem*, 13 Ind. App. 115.

Judgment reversed, with instructions to sustain the demurrer to the first paragraph of complaint, and to sustain the motion to make the second paragraph more specific.

## SHANK ET AL. v. SMITH ET AL.

[No. 19,602. Filed November 15, 1901.]

MUNICIPAL CORPORATIONS. — *Street Improvements.* —

*Guaranty.—Repairs.*—A contract for a street improvement, §§4288-4300 Burns 1901, conditioned that the contractor make all repairs for a period of seven years that became as a result of unskilful construction or unsuitable material, making a certain per cent. of the contract price as a guaranty, such repairs, is not invalid as assessing the cost of repairs of the cost of the construction of the improvement. *Id.*

SAME. — *Street Improvements.—Assessments.—Hearing.*

*Collateral Attack.*—Abutting property owners will be permitted to waive their right to injunction or mandamus, or to a hearing on the engineer's report for street improvement assessments until the assessments are approved, and make the denial of a hearing available as a defense to an action to enforce the collection of the assessments. *pp. 410-412.*

SAME. — *Street Improvements.—Assessments.—Hearing.—Collateral*

*Attack.*—The right of the common council or board of trustees to hear and consider the engineer's report of assessments for street improvements and the adjustment of the assessments to the benefits received is a quasi judicial power, and, where the board had jurisdiction of the person and subject-matter, their judgment, fair on its face, cannot be attacked in a collateral proceeding. *p. 412.*

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From Marion Superior Court; *Vinson Carter*, Judge.

Action by William C. Smith and others against Clara L. Shank and others for the enforcement of street improvement assessments. From a judgment for plaintiffs, defendants appeal. *Affirmed.*

*S. N. Chambers, S. O. Pickens, C. W. Moores and R. F. Davidson*, for appellants.

*L. M. Harvey, W. A. Pickens, L. A. Cox and S. W. Kahn*, for appellees.

HADLEY, J.—In 1898 the board of trustees of the town of Irvington entered into a contract with John Moore for the pavement of the roadway of Washington street, between Wallace street and Central avenue, with brick. Moore assigned the contract to appellee Smith, who constructed the pavement. In making the contract, and in accepting the work when completed, and in assessing the cost thereof against the abutting property, the board of trustees proceeded under §§4288 to 4300 Burns 1901, commonly known as the “Barrett law.” Appellants owned lots, abutting for 400 feet on the improvement, which were assessed their proportion of the cost. Appellants refused to pay the same, and appellee brought this suit to foreclose his lien. The complaint is in the usual form. A demurrer thereto was overruled. Appellants answered in five paragraphs, a demurrer to each of which was sustained, and appellants refusing to plead further, a judgment for the amount of the assessment and decree foreclosing appellee’s lien, was rendered against them. Three questions are presented by the assignment of error. (1) The constitutionality of the Barrett law; (2) the validity of the contract under which the improvement was made; (3) the denial of a hearing on the question of benefits, as set forth in the fifth paragraph of answer, was in effect the taking of appellants’ property without just compensation and without due process of law.

I. The first of these questions has recently received

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consideration by this court in several instances, and must now be considered as settled. See *Adams v. City of Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. 484; *McKee v. Town of Pendleton*, 154 Ind. 652; *Martin v. Wills, ante*, 153; *Leeds v. Defrees, ante*, 392.

II. The second question is stated by appellants thus: "The board of trustees had no authority to contract for repairs to a street, and assess the cost thereof against abutting property as a part of the cost of construction."

As preliminary to the question stated it is important, first, to determine whether the contract before us, as the same relates to the contractor's duty for a period of seven years subsequent to the acceptance of the work by the town, is a contract for repairs, or a contract of guaranty that the improvement shall be executed, in all respects as good as the contractor has engaged to make it. It is alleged in the second paragraph of answer that the improvement consisted in the paving of the street with brick as described in the complaint; that certain written and printed plans, profiles, and specifications were by the express terms of the contract made a part thereof; that bids were made by others and by said John Moore, upon the terms and specifications set forth in said contract, and the work awarded to Moore under the terms thereof; that by the terms of the contract the contractor was obligated not only to improve the street by constructing the pavement in accordance with the plans and specifications, but was also by the express terms of the contract obligated to maintain the pavement in repair for a period of seven years from the time of approval of the assessment roll by the board of trustees, without any compensation in addition to that expressed in the contract, and by the express terms of the contract he was required to and did guarantee such repairs for the period of seven years. That part of the contract exhibited with the answer is as follows: "It is understood and agreed that this guaranty shall cover all repairs growing out of imperfections or unsuitability of

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materials or composition, too great or too little moisture, all defects of workmanship, extremes of heat or cold, and all other effects of climate, and covers all other excessive deteriorations more specifically described as follows: In case of asphalt, brick, or wooden block, any holes or cracks in said pavement and any defects resulting from the composition of the wearing surface or foundation. The pavement, at the expiration of the guaranty period, shall be in good condition, present surface so true and even that it shall in no way be an obstruction to travel, and have drainage so perfect that water shall collect in no place to a depth of more than one-fourth of an inch. The determination of the necessity for repairs rests entirely with the board, whose decision upon the matter shall be final and obligatory upon the contractor; and the guaranty herein stipulated shall extend to the whole body of the improvement and all its appurtenances and the repairs required under it may extend to the total reconstruction of the whole body of the improvement if, in the judgment of the board, such total reconstruction shall become necessary by reason of any defect in original materials or construction. Should the engineer require it, the contractor shall, at any time during the period of construction or maintenance of the work contracted for, make such opening, and to such extent, through any part of said work, as the engineer may direct, and he shall make the same good again to the satisfaction of the board. The party of the first part (the contractor) hereby consents that the said town shall retain, out of the total amount shown by the said estimate to be due from said town on account of street and alley crossings, a sum equal to twenty cents per square yard for each square yard of pavement constructed, which sum shall be and constitute a repair guaranty fund in the hands of said town for the purpose of securing the repair and maintenance of said pavement by the contractor to the satisfaction of the board. In the event the sum above specified shall exceed the amount due said contractor from said town



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on account of the street and alley crossings, then said contractor shall deposit a sum sufficient to make said guaranty fund equal to twenty cents per square yard for each square yard of improvement constructed. This guaranty fund, or only such part of it as shall remain in the hands of the town unexpended, as above provided, at the expiration of said guaranty period, shall be paid to the contractor, with interest at the rate of five per cent. per annum. That in the event the pavement, during the guaranty period, is not in good condition and repair, to the satisfaction of the board of trustees of said town, and if the first party shall refuse or neglect to put the same in repair to the satisfaction of said board on fifteen days' notice, said board may cause the same to be done, and pay for the same out of the guaranty fund above provided for, and said sum or sums so paid for such repair out of said guaranty fund shall constitute and be considered a payment by the said town upon the amount due from it to the contractor on account of the cost of street and alley crossings, and the town shall retain the balance of said funds, if any, in said repair and guaranty fund for use in future repairs. Should the cost of such repairs made by order of the board of trustees exceed the amount retained as above provided, or the amount of said repair fund remaining on hand at the time of making such repairs, the party of the first part shall be held responsible to the town board for the amount of such excess, and such excess shall be collected, by suit, of the contractor."

It is further alleged that the cost of keeping the pavement in repair as required by the contract was taken into consideration by the bidders and by Moore in submitting his bid, and was included in the contract price per lineal foot, for which the contractor performed his work, and for which the assessment was made.

It is proper to observe that appellants do not in their answer plead the contract in terms, nor inform us fully as to its contents. It may therefore be assumed, as against the

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answer, that the contract called for the construction of a pavement, which in form, and quality of material and workmanship, would withstand ordinary uses and climatic changes for a term of seven years, and at the end of that period be in good condition. It cannot be said that seven years is an unreasonable or unusual length of time for a well constructed brick pavement to endure in good condition. Such a pavement the town had the right to put down, and charge the cost to the adjacent property. But in exercising the power to levy special taxes much caution should be observed, and it may be said to be the duty of municipal officers, when proposing to assess the cost against abutting property, to provide for a substantial and durable improvement, and there can be no doubt of their power to throw about the contract such safeguards as will insure its complete performance. Then in contracting for a pavement which is stipulated and warranted to last seven years, and be then smooth and in good condition, the trustees had a right to consider the incidents that were in course of the period liable to arise and destroy the sufficiency of the personal bond of the contractor to make good his contract, and we can see no reason for restricting them to such bond, or for denying them the power to contract for a further and more reliable security by withholding a part of the money due the contractor from the city, until it is determined that the contract is, in fact, executed according to its terms. And if the guaranty provision of such a contract as is set forth in the answer involves no extra cost above what it would have been if the work had been executed at the outset according to the contract, then it must be held to be a contract of guaranty, and not one for repairs. The elements of the guaranty are as follows: The contractor shall make all repairs for a period of seven years that become necessary as a result of (a) defective or unsuitable material; (b) unskilful workmanship; (c) excessive wet or dry weather; (d) extremes of cold or hot weather; (e) any

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climatic cause; (f) all deteriorations which produce holes or cracks in the pavement; (g) all defects resulting from the decomposition of the wearing surface or foundation. The pavement at the end of seven years to be in good condition, and present a surface so even as will not obstruct travel, and will drain therefrom all water in excess of one-fourth of an inch deep. The guarantee to extend to the whole body of the improvement, if in the judgment of the board such total reconstruction shall become necessary by reason of any defect in original materials, or construction. The contractor to make such openings in the work as the engineer may require, and make them good again to the satisfaction of the board. The meaning of all this is that the improvement shall be so skilfully constructed and the materials of which it is composed shall be of a character to, and will, endure ordinary use, and resist the extremes of wet and dry and cold and hot weather without cracking, and without becoming uneven in surface, for a period of seven years. There is nothing in the guaranty that imposes upon the contractor the duty to make general repairs, or such repairs as may become needed from extraordinary use, or from violent injury, by individual, or mob, or from any other cause, other than such as result from unskilfulness in construction, or unsuitableness of material, except the inconsequential duty to make and restore the openings that may be required by the engineer. The contract is an entirety for the sole purpose of providing for the permanent improvement of the street, and the guaranty provision is a stipulated means by which the contractor shall be required to furnish the sort of pavement he proposes to make. The guaranty is of the essence of the contract for the improvement, is in every respect inseparable from it, and goes for nothing, if the contract at the outset is executed according to its terms, and the averment in the answer that the cost of maintenance and repair was included in the bid of the contractor has, therefore, no force. In pavement making it is

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difficult for the most skilful and experienced expert to discover all defects in material, foundation, and other parts of the work, as it progresses, and such defects are often slow of development, and it seems but a wise precaution, and clearly one that the taxpayer should not complain of, for municipal officers so to frame their contracts that neither the abutter nor the municipality shall be called upon to do that which the contractor should have done. A stipulation that the contractor shall wait for a part of his pay until it is proved that his contract has been faithfully kept does not necessarily imply an increase in the first cost of a well constructed street; neither does a covenant to make good his own defaults imply an obligation to repair the whole street, irrespective of the causes which necessitate such repairs. Upon the whole, it seems that the contract before us was designed, and sufficiently phrased, to secure the construction of a good job of brick pavement; and does not impose upon the abutters any burden beyond that of insuring good materials and good workmanship; that nothing more was intended, or may be reasonably implied; and that the provision for mending was a guaranty of performance which furnishes no reasonable ground for an increase of cost.

Kindred questions have been frequently decided by the courts, which decisions upon first blush seem to be in irreconcilable conflict, even those of the same state in some instances, but upon a closer examination it will be found that one uniform principle has been generally applied, and the diversity has arisen from an application of the principle to the facts of particular cases. The general rule being that when the contract amounts to nothing more than an agreement to make the work what it should have been in the first instance, it is a mere guaranty of the quality of the work, and is not unauthorized, but anything in excess of this is a contract for repairs, which is unauthorized in cases where the proper preliminary steps have not been taken, or in cases where the duty to repair rests upon the municipality

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at large. Among the cases of the class to which this belongs are the following: *Robertson v. City of Omaha* (1898), 55 Neb. 718, 76 N. W. 442, 44 L. R. A. 534; *Osburn v. City of Lyons* (1897), 104 Iowa 160, 73 N. W. 650; *Allen v. City of Davenport* (1898), 107 Iowa 90, 77 N. W. 532; *Cole v. People* (1896), 161 Ill. 16, 43 N. E. 607; *Latham v. Wilmette* (1897), 168 Ill. 153, 48 N. E. 311; *Barber Asphalt Co. v. Ullman* (1897), 137 Mo. 543-565, 38 S. W. 458; *Seaboard Bank v. Woesten* (1898), 147 Mo. 467-478, 48 S. W. 939, 48 L. R. A. 279; *Barber Asphalt Co. v. Hezel* (1900), 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285; *State v. City of Trenton* (1897), 60 N. J. L. 394, 38 Atl. 635; *Wilson v. City of Trenton* (1898), 61 N. J. L. 599, 40 Atl. 575, 44 L. R. A. 540, 68 Am. St. 714; *City of Schenectady v. Union College* (1892), 66 Hun 179, 21 N. Y. Supp. 147.

Among the cases applying the principle to instances wherein contracts had been made for maintenance or repairs, in excess of those necessitated by the default of the contractor, for a definite period, in connection with improvement contracts, are these: *Brown v. Jenks* (1893), 98 Cal. 10, 32 Pac. 701; *Boyd v. City of Milwaukee* (1896), 92 Wis. 456, 66 N. W. 603; *City of Portland v. Paving Co.* (1898), 33 Ore. 307, 52 Pac. 28, 44 L. R. A. 527, 72 Am. St. 713; *McAllister v. City of Tacoma* (1894), 9 Wash. 227, 37 Pac. 447, 658; *People v. Maher* (1890), 9 N. Y. Supp. 94; *Fehler v. Gosnell* (1896), 99 Ky. 380, 392, 35 S. W. 1125; *Verdin v. City of St. Louis* (1895), 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Alameda, etc., Co. v. Pringle* (1900), 130 Cal. 226, 62 Pac. 394, 80 Am. St. 124.

As illustrative of the contracts under review in these last cases, it was said in the California case: "Besides it is for all repairs, and not such as may result from defects in the work." In the Wisconsin case: "If the agreement to repair were confined to repairs made necessary by defective

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workmanship or material, the argument would be entitled to serious consideration. But they go further. They cover in terms everything that may happen to the pavement except the cutting through of certain pipes." In the Oregon case: "But the bond in question is distinctly an independent undertaking to keep the street and pavement in repair \* \* \* covering, in effect, all injuries liable to arise from whatever source", and in the Washington case: "But the action of the board had the effect of making the abutting property owners pay for all repairs, and not only that, but pay for them five years in advance." The last case cited goes to an extreme length.

III. In the fifth paragraph of answer it is alleged that the town proceeded under the Barrett law and gave the proper notice of the time and place for the hearing of the engineer's report. The answer then continues: "And defendants aver that pursuant to the notice alleged in the complaint that a hearing would be accorded to the owners of property bordering on said improvement before a committee appointed by said board to consider the report of said engineer, defendants appeared before said committee at the time and place specified in said notice, and objected to the said report and the assessments made against their property by said report, on the ground that the cost of said improvement assessed against defendants' said property and each piece and parcel thereof was largely in excess of the benefit received or which would be received by the said property from said improvement, and demanded a hearing to enable the defendants to show that the portion of the cost of said improvement assessed against their said property and each piece and parcel thereof was largely in excess of the benefits accrued or which would accrue to said property from said improvement; but the defendants were by the said committee and the said board of trustees of said town denied a hearing as to said question of benefits to said property, and the said committee reported to the board of trustees of said

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town, recommending the adoption of the said report of said town engineer without alteration or change, and the said board of trustees thereupon adopted said report without alteration or amendment, \* \* \*. And the defendants, by the said action of the said committee and the said board of trustees of said town, were denied a hearing as to the question of fact whether the said assessment against defendants' said property was in excess of the benefits accrued or which would accrue to said property from said improvement."

It is averred in the answer that appellants appeared before the special committee having the engineer's report under consideration, at the time and place specified in the notice, and objected to the report on the ground of excessive assessments against their property, and demanded a hearing to enable them to prove it. But the committee and also the board of trustees denied them a hearing. What was the nature of the demand and denial? Was appellants' offer to testify before the committee, or their offer to produce other competent witnesses who would testify concerning their benefits, denied? Did appellants appear before the board of trustees, as they had the right to do, and make objection, and demand a hearing? Or was the performance a verbal objection to the report, and demand for a hearing at some indefinite or unreasonable time, or before a jury, or at a time, or upon terms named by the objectors? And how did they ascertain that the board denied them a hearing if they did not appear before it? We are not informed on these matters, and we cannot enter the field of conjecture in quest of missing facts to make out a cause of defense. This court cannot accept the conclusion of the pleader, but must have before it the facts from which the conclusion is drawn to enable it to determine for itself whether a hearing was denied.

Assuming that both the committee and board of trustees refused to grant appellants a hearing, they could not be permitted to waive their right to bring mandamus to compel a hearing, or injunction against the approval of the engin-

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eer's report until it had been accorded, and make the denial of a hearing available as a defense in an action to collect the assessment. The right of the board in such cases to consider the engineer's report, and adjust the assessments to benefits received is a *quasi* judicial power. Here the proper notice was given, the board had jurisdiction of the person and subject-matter, the power to decide, and their judgment thus fair upon its face cannot be collaterally attacked. *Leeds v. Defrees, ante*, 392.

Some subsidiary questions touching the subject of repairs which have been discussed become immaterial under the view we have taken. Judgment affirmed.

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**THE STATE, EX REL. BUNN, v. FISHER, MAYOR, ET AL.**

[No. 19,649. Filed November 19, 1901.]

**MANDAMUS.—Removal of Policeman.—Charges.**—Where a policeman of a city was removed by a majority vote, but less than two-thirds vote of the common council, a petition thereafter for a writ of mandate to compel the mayor and council to prefer charges against him as policeman before removing him is insufficient which fails to show when relator was appointed, for what term or length of time, upon what conditions, or that any demand for a trial or other redress was made, or that he requested a reinstatement, or to have the proceedings set aside.

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Mandamus by State on the relation of Watson H. Bunn, against Manuel M. Fisher, Mayor of Mishawaka, and the common council of such city. From a judgment for defendants, relator appeals. *Affirmed.*

*T. E. Howard* and *E. A. Howard*, for appellant.

**DOWLING, J.**—Petition by the relator for a writ of mandate to compel the mayor and common council of the city of Mishawaka, Indiana, to prefer charges against him as a policeman, give him notice of such charges, grant him a hearing, and allow him to defend before they remove him from the position of a policeman of said city.

It is alleged in the petition and writ that the relator is a

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policeman of the city of Mishawaka, duly appointed by the common council of said city; that he has qualified and given bond; and that on the 4th day of March, 1901, the appellees removed him from office by a majority vote, but by less than a two-thirds vote of the common council, without charges being preferred or a hearing of the same. An alternative writ was issued and served, and a demurrer to the petition and writ was sustained. The relator refusing to amend his petition, judgment was rendered on the demurrer. The ruling upon the demurrer is assigned for error.

The complaint and writ must be held insufficient. They fail to show when the relator was appointed, for what term or length of time, upon what conditions, or that any demand for a trial or other redress was made. The petition asks that the common council be required to prefer charges against the relator. Certainly, that body cannot be compelled to do this. There may be no grounds for charges. Again, the relator has already been removed. He does not ask to be reinstated, or to have the proceedings for his removal set aside. For all that appears, he may have consented to the action of the common council.

The general rule in proceedings of this character is thus stated: "The petition for a writ of mandamus should present to the court a *prima facie* case of duty on the part of the defendant to perform the act demanded, and an obligation to perform it; otherwise, the alternative writ will not be granted. It should also appear from the petition that a demand has been made on the defendant to do the thing he is sought to be compelled to do, and that he has refused or neglected to do it. (Stephens' Nisi Prius, 2318, 2319; *People v. Walker*, 9 Mich. 328.) And the facts and circumstances under which the petitioner claims the relief prayed should be stated fully, clearly and unreservedly, and not inferentially. (*Commonwealth v. Commissioners*, 37 Pa. St. 277)". Moses on Mandamus, 204.

The complaint and writ in this case comply with none of these requirements. Judgment affirmed.

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## THE INDIANAPOLIS STREET RAILWAY COMPANY v. ROBINSON.

[No. 19,664. Filed November 22, 1901.]

**NEGLIGENCE.—Pleading.—Contributory Negligence.—Constitutional Law.**—The act of 1899 (Acts 1899, p. 58, §359 Burns 1901), providing that in all actions for damages arising from personal injury or death it shall not be necessary to allege or prove freedom from negligence on the part of plaintiff, or on the part of the person for whose injury or death the action is brought, is not unconstitutional as a special law regulating the practice in courts of justice. *p. 416.*

**SAME.—Medical Care.—Pleading.—Husband and Wife.**—In an action by a husband for damages for loss of services of his wife, resulting from an injury sustained by her through the alleged negligence of defendant, it is not necessary to allege that plaintiff used reasonable diligence to provide medical attention and other care for his wife, as such negligence, if it existed, was matter in defense. *pp. 416, 417.*

**SAME.—Pleading.—Trial.—Evidence.—Husband and Wife.**—Where a complaint in an action by a husband for loss of services of his wife alleged that the loss of services and the expense for care and medical attention were the result of the injury sustained by the wife as a consequence of defendant's negligence, if the effect of the injury was aggravated by the neglect of plaintiff to furnish proper care, such neglect might be proved under the general denial in mitigation of damages. *pp. 416, 417.*

**SAME.—Evidence.—Medical Service.—Husband and Wife.**—Where, in an action by a husband for personal injuries sustained by his wife, the family physician testified that in his opinion a surgical operation might become necessary to relieve plaintiff's wife, it was proper to show the expense of such operation. *p. 417.*

**SAME.—Personal Injury.—Evidence.—Street Railroads.**—In an action by a husband for personal injuries to his wife, evidence that the wife did not sleep well after the accident, and had to take medicine to produce sleep, was competent. *p. 418.*

**STREET RAILROADS.—Personal Injury.—Evidence.**—The testimony of plaintiff's wife, in an action for injuries sustained by her by reason of a defective board in defendant's railroad platform, that the crowd of people on the platform prevented her from seeing the defect, was the statement of a fact and not a conclusion. *p. 418.*

**SAME.—Personal Injury.—Evidence.**—Where, in an action against a street railroad for personal injuries sustained because of a defect in the platform, plaintiff introduced evidence to show that

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the crowd of people on the platform prevented the injured person from seeing the defect, it was not error to exclude the testimony of a witness offered by defendant that on Sundays during the summer of 1891 but few people returned to the city by defendant's cars, as the term "few" was too indefinite. pp. 418, 419.

**STREET RAILROADS.—Instruction.—Negligence.—Personal Injury.—**

An instruction in an action against a street railroad for personal injuries caused by a defective board in the station platform, that the injured person was guilty of negligence if she stepped into a hole in the platform, or upon a rotten board, without looking where she was stepping, or taking any precaution to ascertain the danger, was properly refused, since the situation may have been such that the woman could not have been able to see the defect. p. 419.

**SAME.—Negligence.—Injury of Person at Station.—**A street railroad company is not relieved from liability to a passenger for personal injury caused by a defective board in its station platform, by reason of the fact that the crowd of persons attempting to get upon the cars pushed the injured person into a place of danger and prevented her from avoiding the danger. p. 420.

**DAMAGES.—Action by Husband for Injury to Wife.—**In an action by a husband for personal injuries to his wife, the question for the consideration of the jury in determining the amount of damages to which plaintiff is entitled to recover is not how much the husband had realized or accumulated in the past from the services of his wife, but what were the services of the wife to the husband reasonably worth. pp. 420, 421.

**SAME.—Action by Husband for Injury to Wife.—**Damages may be awarded the husband for the loss of companionship and society of his wife in an action for personal injury to the wife, although the complaint does not in so many words charge that in consequence of the injury he has been and will be deprived of her society, where the complaint discloses that such has been the result of the accident, and that such condition is likely to continue. pp. 421, 422.

**SAME.—Verdict.—Excessive Damages.—**A verdict will not be set aside as excessive where there is nothing to show that the jury were influenced by improper considerations, or that they misunderstood or misapplied the evidence. p. 422.

From Marion Circuit Court; *H. C. Allen*, Judge.

Action by David Robinson against the Indianapolis Street Railway Company on account of personal injuries to his wife. From a judgment for plaintiff, defendant appeals. *Affirmed.*

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*S. N. Chambers, S. O. Pickens, C. W. Moores, F. Winter and W. H. Latta*, for appellant.

*Eli F. Ritter and W. S. Doan*, for appellee.

DOWLING, J.—The appellee recovered a judgment against the appellant for damages on account of the loss of the services, etc., of his wife in consequence of an injury sustained by her through the alleged negligence of the appellant. This negligence, it is charged, consisted in permitting a decayed or broken board to remain in the floor of a platform at one of appellant's stations. While appellee's wife was crossing this platform on her way to appellant's cars, the board broke, or she stepped into a hole in it, and was permanently injured and disabled.

The appellant insists that the complaint is bad because it does not negative contributory negligence on the part of appellee and his wife. It contends that the act of February 17, 1899, dispensing with this allegation, is unconstitutional, for the reason that it is a special law regulating the practice in courts of justice. Both of these points were decided otherwise in *Indianapolis St. R. Co. v. Robinson, ante*, 232.

The appellant next contends that the complaint is insufficient because it does not aver that the appellee used reasonable diligence to provide medical attention and other care for his wife. An averment of this character was not necessary. If the failure of the appellee to provide such attention and care prolonged the illness and disability of his wife, such neglect was matter of defense. The complaint alleged that the loss of the services, etc., of the wife, and the expenses for care and medical attention were the result of the injury sustained by the wife. If this was not true, or if the effects of the injury were aggravated by the failure of the appellee to use ordinary care to restore the health of his wife, this neglect might be proved under the general denial in mitigation of damages. Such neglect would not destroy the right of action, but would affect only the extent of the

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damages to be recovered. *Waxahachie v. Connor* (Tex. Civ. App.), 35 S. W. 692; *Chicago, etc., R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290; *Taylor v. City of Springfield*, 61 Mo. App. 263.

The family physician of the appellee had testified that, in his opinion, a surgical operation might become necessary to relieve appellee's wife. Over the objection of appellant, he was permitted to answer the question, "What would be a reasonable charge for performing that operation?" His answer was: "\$250 to \$300." It is true, as stated by counsel for the appellant, that the appellee alleged in his complaint that the injury to his wife had resulted in her permanent disability. But he was not compelled to prove this averment. Under the allegations of the complaint, if it appeared from the proof that the appellee was deprived of the services and society of his wife in consequence of an actionable injury by the appellant, even temporarily, then, upon this branch of the case, the appellee would be entitled to recover for such time as such disability lasted. It is to be borne in mind that, for the alleged injury, there could be but one action by the husband, and one recovery, and that all damages past, present, and prospective must be included in the verdict. *Town of Elkhart v. Ritter*, 66 Ind. 136; *City of North Vernon v. Voegler*, 103 Ind. 314.

The appellee had the right to show, if he could, that a surgical operation would probably be necessary to save the life, or to relieve the sufferings of his wife, and the expense attending the operation. The appellee owed to his wife the duty of providing for her whatever surgical and medical treatment her case demanded, and if there was a probability that an operation would be required, it was proper to prove the fact, and to show how much such operation would cost the appellee.

For similar reasons, the evidence of the expense of nursing and caring for appellee's wife in case an operation should be performed was properly admitted.

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Proof of the fact that appellee's wife, after the accident and injury, did not sleep well, and had to take medicine to produce sleep, was competent. This evidence tended to support the charge that appellee's wife was sick, and in a disabled condition. If she could not obtain natural rest, and had to resort to narcotics to produce sleep, the probable result would be loss of strength and energy and, hence, inability to render the services for the loss of which the action was prosecuted. On the same grounds, the testimony of appellee's wife that her sleep was disturbed, and that she did not get sufficient rest, was properly admitted.

The appellant objected to the admission of the testimony of appellee's wife that the crowd of people on the platform prevented her from seeing the hole in the platform. It is said that this was the statement of a conclusion, and not of a fact. We think it was the statement of a fact. If the appellant wished to know how many persons constituted the crowd, and where they were, with reference to the hole in the platform and to the appellee's wife at the time of the accident, and how they prevented her from seeing the hole, it could have asked these questions upon cross-examination, or it could have proved the facts by other witnesses.

The court excluded the testimony of one Bruce, a witness for appellant, that, between 3 and 4 o'clock p. m. on Sundays during the summer of 1899, but few people returned to the city by appellant's cars, and this ruling is complained of. There was no error in this decision. The term "few", as used in the proposed evidence, was very indefinite, and, applied to Sunday travel on a street railroad, might have meant fifty persons or 500. The evidence, if admitted, would have proved nothing, for even a few persons crowded together upon a narrow platform in an attempt to get upon a street car might prevent any one of their number from seeing a defective plank in the floor of the platform. Besides, appellee's wife did not say that the crowd on the platform was composed of intended passengers. The crowd may have

been made up of persons who had just arrived, or who were there for some other purpose than returning to the city on appellant's cars.

The appellant next complains that the court erred in refusing to give instructions numbered five, seven, thirteen, seventeen, twenty-one, and twenty-four as requested by it. The record shows that instruction numbered five was given.

The substance of instruction numbered seven was that the company was not bound in law to know of the existence of the alleged defect, but that it must be proved by a preponderance of the evidence, either that the company had knowledge of the alleged defect, or that the company failed to make such inspection of its premises as the law requires, or that, by the exercise of the care required by the law, the defendant might have known of the existence of the defect, and of its liability to produce some injury to persons using the platform.

Instructions numbered three, four, five, and six, which were given at the request of the appellant, fully covered the matters contained in instruction numbered seven, and stated the law quite as favorably to the appellant as it had a right to ask. Instruction numbered seven was a mere summing up and repetition of instructions numbered three, four, five, and six, and was correctly refused.

Instruction numbered thirteen, asked for by appellant, was properly refused by the court because it declared without qualification that appellee's wife was guilty of negligence if she stepped into a hole in the platform, or upon a rotten board, without looking where she was stepping, or taking any precaution to ascertain the danger. If the situation at the time of the accident was such that the woman could not see the hole, or if there was nothing in the appearance of the decayed plank to indicate that it was liable to break, she was not negligent in stepping into the hole or upon the plank. Without these qualifications, the proposed instruction did not state the law.



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Instruction numbered seventeen undertook to shift the responsibility for the accident to appellee's wife from the appellant, which maintained a defective platform, to the crowd which pushed appellee's wife into a place of danger, or prevented her from avoiding the place by the exercise of ordinary care. But appellant was bound to know that crowds might congregate upon its platform, and that injury to its intended passengers might result from defects in its platform under such circumstances. The presence and struggle of the crowd to get upon appellant's cars only increased the danger of accidents from the unsafe platform; it did not relieve the appellant from responsibility for such accidents.

It is settled by numerous decisions that railroad companies must provide means by which their passengers may safely enter their cars at stations, and must keep their platforms provided for that purpose in a safe condition. They are bound to know that if platforms become unsafe, the lives and limbs of passengers are put in peril. Failure to keep such platforms in a safe condition for the use of passengers entering or leaving their cars is a neglect of duty which makes the company liable to persons injured, without fault on their part, by reason of such defective platform. *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, 6 L. R. A. 193; *Lucas v. Pennsylvania Co.*, 120 Ind. 205, 16 Am. St. 323; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 7 L. R. A. 687, 18 Am. St. 330.

"It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so. *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323." *Pennsylvania R. Co. v. White*, 88 Pa. St. 327. This statement of the law is quoted and approved in *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, p. 357, 49 Am. Rep. 168.

Instruction numbered twenty-one, tendered by appellant and refused by the court, was as follows: "In consider-



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ing the measure of the plaintiff's damage, if any, it is proper to take into consideration the amount, if anything, which the plaintiff has realized and accumulated in the past from the services of his wife, over and above the expenses of her support. And, if it be shown by the evidence that he realized and accumulated nothing from her said services in excess of her support, then you may consider that fact also." We are referred to no authority in support of this statement of the law, nor have we been able to discover any. The question was not how much the husband had realized and accumulated in the past from the services of his wife, but what were the services of the wife to the husband reasonably worth. The appellee may not have realized and accumulated anything in the past from the services of his wife, and yet those services may have been most valuable. It was for the jury to determine from the evidence what that value was, irrespective of the actual amount "realized and accumulated in the past in excess of the cost of her support."

Instruction numbered twenty-four in effect informed the jury that they might consider whether the physical derangement from which it was claimed appellee's wife was suffering was the result of the accident complained of, or was due to some other cause. This subject was fully covered by other instructions given by the court, and its further presentation in the form proposed by appellant was not necessary.

In addition to the instructions requested by the appellant, which were given, the court gave fourteen of its own, which covered every feature of the case and, as we think, fairly stated the law. None of the objections to them is well founded. The *second* informed the jury that the burden of establishing contributory fault was upon the defendant. There was no error in this. The *seventh* and *tenth* related to the duty of the appellant to provide and maintain a safe platform at its station for the use of its passengers, and were clearly correct. The *eleventh* instruction is com-

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plained of because it told the jury that they might give to the appellee damages for the loss of the companionship and society of his wife, and because it did not limit the damages to those shown by the evidence. While the complaint does not in so many words charge that, in consequence of the injury to his wife, he has been and will be deprived of her society, its averments plainly disclose that such has been the result of the accident, and that such condition is likely to continue. As to the *second* point made against this instruction, it seems clear to us that the jury could not have been misled. In every part of the charge, and repeatedly in this instruction, the jury were told that everything done by them must be done "under the evidence", and they could not have understood that, in assessing the plaintiff's damages, they could go outside of the evidence. The repetition of the cautionary words in every sentence of the instruction was not necessary, and as it is evident that the appellant could not have suffered harm from the instruction as framed, we must hold that the objections to it were insufficient.

It is insisted in the last place that the damages are excessive, and the appellant presents a computation which indicates that the amount allowed was larger than the sum proved. But this calculation takes no account of prospective loss occasioned by the permanent disability of the wife, and hence is incorrect. There is nothing in the assessment made by the jury to indicate that they were influenced by improper considerations, or that they misunderstood or misapplied the evidence.

There is no error in the record. Judgment affirmed.

## Musser v. State.

## MUSSER v. THE STATE.

[No. 19,064. Filed June 25, 1901. Rehearing denied Nov. 22, 1901.]

**CRIMINAL LAW.—Murder.—Evidence.**—In a trial for murder it was not error to admit in evidence an anonymous postal card received by the city marshal, stating that a woman living at a certain street had been robbed, where the jury were instructed that it was admitted only for the purposes of showing the information upon which the marshal acted in discovering the robbery and murder, and as tending to show the time when the same was placed in the postoffice. *pp. 427, 428.*

**SAME.—Murder.—Evidence.**—Where in a prosecution for murder the theory of the State was that the crimes of burglary, robbery and murder were committed, and that three persons participated therein, evidence that it was generally known that the murdered woman had money was properly admitted, where it was shown that one of the persons jointly indicted with defendant, and who the evidence tended to show was present when the murder was committed, stated a few days before the murder "that his partner had just got out of jail; that he was going up the line to pull off a peach; that there was an old lady up the line who was afraid of banks, that she had lots of money and lived all alone," etc. *pp. 428-430.*

**TRIAL.—Evidence.—Objection.—Exception.—Appeal and Error.**—An objection to a question, "that it is incompetent and immaterial and too remote," is too uncertain, indefinite and general to present any question. *pp. 430, 431.*

**SAME.—Evidence.—Objection.—Exception.—Appeal and Error.**—Objections to the admission of evidence not made in the court below will not be considered on appeal. *pp. 430, 431.*

**CRIMINAL LAW.—Murder.—Conspiracy.—Evidence.**—Where in a prosecution for murder there was evidence tending to show that three persons were present at the commission of the crime, evidence that one of the persons, who was jointly indicted with defendant, had in his possession, the next day after the murder, money, bills, and gold of the same denomination and kind shown to have been in the possession of the murdered woman before her death was properly admitted. *pp. 431-440.*

**SAME.—Murder.—Conspiracy.—Evidence.—Declarations of Co-conspirator.**—Where two or more persons are charged with a substantive offense, not a conspiracy, and it appears that the same was committed in pursuance of a conspiracy, the acts and declarations

157	423
160	327
160	576
157	423
161	298

157	423
163	574

157	423
164	237

157	423
165	441

157	423
168	89
168	437

157	423
169	313
169	314
169	315
169	502
169	503

157	423
171	700

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of one shown to have been engaged in the conspiracy to commit such substantive crime are admissible in evidence on the trial of the other defendant, notwithstanding the person whose declarations are sought to be proved had been previously acquitted. *pp. 440, 441.*

**APPEAL AND ERROR.—Record.—Evidence.—Written Instrument.—**

Where a written instrument is offered in evidence and excluded, it must be brought into the record, in order to present any question on the ruling excluding it. *p. 441.*

**CRIMINAL LAW.—Murder.—Joint Indictment.—Acquittal of One.—**

*Evidence.*—In a trial for murder the record of the acquittal of one jointly indicted with defendant was properly excluded. *p. 441.*

**SAME.—Murder.—Conspiracy.—Circumstantial Evidence.—Instruc-**

*tion.*—In a trial for murder, in which there was evidence that defendant conspired with others to commit the crime, the court properly instructed the jury that evidence in proof of the conspiracy is generally circumstantial, and that it is not necessary for the purpose of showing the existence of the conspiracy to prove that defendant and some other person or persons came together and actually agreed upon a common design or purpose, and agreed to pursue such common design and purpose in the manner agreed upon, but that it is sufficient if such common design and purpose is satisfactorily shown by circumstantial evidence. *pp. 442, 443.*

**SAME.—Murder.—Conspiracy.—Evidence.—Instruction.—**

An instruction in the trial of one charged with murder, in which there was evidence of conspiring with others to commit the crime, the court properly instructed the jury that while it is necessary, in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose, and that such common design may be regarded as proved if the jury believe from the evidence that the parties to such conspiracy were actually pursuing in concert the common design or purpose, whether acting separately or together, by common or different means, provided they all were leading to the same unlawful result. *pp. 442, 443.*

**SAME.—Murder.—Conspiracy.—Instruction.—Reasonable Doubt.—**

Where defendant on trial for murder was indicted jointly with another, an instruction defining conspiracy, and the evidence necessary to establish the same, was not erroneous because it did not state that the facts and circumstances establishing the conspiracy must be proved beyond a reasonable doubt, the indictment not charging defendant with the offense of a conspiracy, but with the crime of murder in the first degree. *p. 443.*

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**TRIAL.—Instructions Must be Considered as an Entirety.**—Instructions are considered with reference to each other, and as an entirety, and not separately, or in dissected parts, and if the instructions as a whole correctly and fairly present the law to the jury, even if some particular instruction, or some portion of an instruction, standing alone or taken abstractly, and not explained or qualified by others, may be erroneous, it will afford no ground for reversal. *p. 444.*

**SAME.—Instructions.—Harmless Error.**—Mere verbal inaccuracies in instructions, or technical errors in the statement of abstract propositions of law, furnish no grounds for reversal, when they result in no substantial harm to defendant, if the instructions, taken as a whole, correctly state the law applicable to the facts of the case; nor is the giving of an erroneous instruction reversible error, when it appears that the substantial rights of the complaining party have not been prejudiced thereby. *pp. 444, 445.*

**SAME.—Instructions.—Harmless Error.**—Available error cannot be predicated upon the refusal of the court to give certain instructions tendered by defendant, where the instructions were not signed as required by statute. *pp. 445, 446.*

From Blackford Circuit Court; *J. S. Dailey*, Special Judge.

Albert Musser was tried and convicted of murder in the first degree, and he appeals. *Affirmed.*

*J. T. France, J. W. Kelley and J. A. Hindman*, for appellant.

*W. L. Taylor*, Attorney-General, *A. M. Waltz* and *G. W. Bergman*, for State.

**MONKS, C. J.**—Appellant and one Samuel H. Marshall were charged by indictment in the Jay Circuit Court with the crime of murder in the first degree for the killing of Louisa Stolz. On application of appellant the venue was changed, as to him, to the court below, where a trial resulted in a verdict that appellant was guilty of murder in the first degree as charged, and assessing his punishment at imprisonment for life. Over his motion for a new trial, final judgment was rendered on the verdict. The only errors assigned call in question the action of the court in overruling appellant's motion for a new trial.

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Louisa Stolz, the deceased, was a widow, seventy-four years old, about five feet in height, and weighed about ninety pounds; she resided on a sparsely settled street in the suburbs of the city of Portland; immediately back of her residence was located the stave and heading factory of S. H. Adams & Company, and just opposite was the residence of her nearest neighbor, Mrs. Loretta Boes. Mrs. Stolz had lived alone in this residence since the death of her husband in 1889. She was a woman of wealth, and it was generally understood that she kept considerable sums of money about her house. She was eccentric, a recluse, having but few visitors, and of a miserly disposition. On Saturday, February 12, 1898, about 1 o'clock in the afternoon, Mont. Mahan, the city marshal of Portland received through the postoffice an anonymous postal card notifying him "that the old lady living near the north end heading factory" had been robbed. He at once went to her residence, and after knocking at the door and receiving no response went across the street to Mrs. Loretta Boes, a neighbor, and showed her the postal card, and then returned to the business part of the city. Afterwards on the same day Mrs. Boes with two men from the heading factory went to the residence of Mrs. Louisa Stolz, and, finding the outside kitchen door unlocked, entered the house, and in the sitting-room found her dead. Her hands and feet were bound, and her mouth and the upper part of her throat filled with a cotton cloth, and a red handkerchief was bound about her head, and her head and face were covered with a large cotton spread. On one side of the throat were three or four blue marks or bruises; on the other side but one; the face was dark; the cartilaginous rings composing the trachea were crushed and broken. Death had been produced by strangulation, either by pressure of a human hand upon the throat or by the cloth that had been pressed into the mouth, or both. When the cloth was removed from the mouth, discolored virus and blood, with the odor of

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putrefaction followed. The body was highly discolored. *Rigor mortis* was leaving the body, the lower part of the abdominal cavity was all green, and putrefaction had begun. The day was cold and raw; the temperature at 6 o'clock a. m. of that day was thirty-one degrees Fahrenheit. The various rooms in the home had been ransacked; drawers opened and emptied of their contents; beds torn up; valuable papers, such as mortgages, certificates of deposit, and notes were scattered upon the floor; among these papers were found some empty cotton money sacks such as she was known to have carried money (\$20 gold pieces) in but a short time before her death; there was dry mud in her hair when the body was found and also upon the shoulder of her dress. On the outside of the house, and at the north end of the same, were her carpet slippers soaked with water. It had rained during the day and evening of Friday, February 11th. Near by was what appeared like the print of a shoulder in the mud. There were tracks near by filled with water, and some partly obliterated by the rain; some of the tracks were made with pointed-toed shoes and the others with broad-toed shoes.

The postal card received by the city marshal was read in evidence over the objection of appellant. It was proper for the marshal to testify when he received the postal card, and as to the information it contained, as a reason for his going to the residence of Mrs. Stolz, and to that part of the city, and for having informed Mrs. Boes, who afterwards discovered the body of the deceased, of such information. While it may not have been necessary to read the postal card in evidence for this purpose, it was not improper to do so. The court instructed the jury that the postal card and the postmark thereon were only admitted in evidence for the purpose of showing the information upon which the marshal acted in what he did, and as tending to show the time when the same was placed in the postoffice. No error prejudicial to

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appellant was committed in admitting the postal card in evidence.

During the progress of the trial Loretta Boes, a witness for the State, who lived across the street from Mrs. Stolz, testified without objection that she "always considered that the deceased was a woman of considerable means." The State thereupon asked her "whether that information was confined to the people living immediately near, or was it general," if she knew. To this question appellant objected for the reason "that the same is hearsay, and wholly immaterial and irrelevant". The court overruled the objection, and the witness answered. "Yes it was generally known that she had money." It is probably true that the objection to the question was not sufficiently specific to present any question. Elliott's App. Proc. §§779-781; *Swaim v. Swaim*, 134 Ind. 596, 598; *Johnson v. Brown*, 130 Ind. 534, 536; *Evansville, etc., R. Co. v. Fetting*, 130 Ind. 61, 62; *Cincinnati, etc., R. Co. v. Howard*, 124 Ind. 280, 282, 283, 8 L. R. A. 593, 19 Am. St. 96. Appellant now urges that it was an attempt to prove by reputation that the deceased kept large sums of money about the house. And "that because of the fact that Marshall and appellant were known to have had money a day or two after the murder of the deceased, and that her house showed signs of having been robbed, that it would be conclusive evidence that they had robbed her." There was other evidence from which the jury was authorized to find that the deceased kept a considerable sum of money, paper and gold, about her house. The evidence objected to, however, was clearly proper for another purpose. The theory of the State was that the crimes of burglary, robbery, and murder were perpetrated on the night of Thursday, February 10, 1898, and that three persons participated therein, one a resident of Portland, who had a crippled arm, the others being appellant and said Samuel H. Marshall, who was jointly indicted with him. It appears from the evidence that said Marshall ar-



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rived in the city of Anderson, Indiana, on February 7, 1898, being Monday of the week of the murder, and that on the same day appellant was released from the county jail in said city, where he had been imprisoned since the 19th day of January, 1898. That neither of said parties had any money. On Wednesday, February 9th, at about 8 o'clock p. m., appellant came into the boiler room of a paper-mill at Muncie, Ind., and told the boiler tender with whom he was acquainted that he had come from Anderson, and that a paper man had come with him. Appellant had formerly worked at this mill. Samuel H. Marshall was also a straw-board worker. Appellant slept in the boiler room of the paper-mill that night. Samuel H. Marshall came into said paper-mill between 10 and 12 o'clock the same night. About 11 o'clock that night he came down into the boiler room from the machine room of the mill and inquired for appellant, and requested the boiler tender to wake appellant at 6 o'clock next morning and send him up to the machine room. Marshall slept in the machine room that night. He told Frank Markel, the machine tender who was working in the mill, that he had come from Anderson; "that his partner was sleeping down-stairs in the boiler room; that his partner had just got out of jail at Anderson; that he was going up the line to pull off a peach; that there was an old lady up the line who was afraid of banks; that she had lots of money and lived all alone; that she was supposed to have between \$5,000 and \$7,000 in the house; that there was a young fellow up there who had his right arm blown off in a safe cracking job; that there was no house near only across the street, and a factory near by; that his partner was down in the boiler room, and he knew where the money was." The next morning, the 10th, about 6 o'clock, the boiler tender awoke the appellant and told him Marshall was up-stairs and wanted to see him, and appellant said "all right". He got up and went to the machine room and inquired for Marshall. Appellant and Marshall stepped to one side and

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talked together for several minutes. On the afternoon of that day, Thursday, February 10, 1898, appellant, Marshall, and a young man of Portland with a crippled arm were seen together in Portland near the water tank of the Grand Rapids & Indiana Railroad. Appellant wore square-toed shoes. While in company with appellant and Marshall that afternoon, said young man hid at the approach of a person he knew. About 3 o'clock on said afternoon appellant in company with said young man visited the stave and heading factory of S. H. Adams & Company a short distance from the residence of the deceased, and appellant talked with a workman employed in said factory. About 4 o'clock of said afternoon appellant and Marshall were in a restaurant in said city of Portland and about dusk they were seen together within one and one-half squares of the Stolz residence. Between 6 and 7 o'clock the same evening appellant, Marshall, and said young man were seen going north in the direction of the Stolz residence. In connection with the evidence of the foregoing facts it was proper for the State to prove that it was generally understood, or believed, that Mrs. Stolz kept money or large sums of money at her house. This evidence was proper for the jury to consider in connection with the other evidence in the cause in determining whether or not Mrs. Stolz was the old lady referred to by Marshall in his statement at the paper-mill at Muncie. In the determination of this question the materiality of the evidence depended, not upon whether the deceased in fact kept large sums of money about the house but upon that being the general understanding.

It is assigned as the fifty-fifth cause for a new trial that the court erred in permitting Kate Riley, a witness for the State, to answer a question, which is set forth, over the objection and exception of appellant. The objection stated by appellant to the question was "that it is incompetent and immaterial and too remote." An entirely different objection to the question is urged by appellant in this court. It

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is settled law that said grounds of objection stated in the court below were too indefinite, uncertain, and general to present any question. *Mortgage Trust Co. v. Moore*, 150 Ind. 465, 470; *Miller v. Dill*, 149 Ind. 326, 331, 332; *Indiana, etc., Co. v. Wagner*, 138 Ind. 658; *Board, etc., v. O'Connor*, 137 Ind. 622, 637, 638; *Bass v. State*, 136 Ind. 165, 170, 171; *Swaim v. Swaim*, 134 Ind. 596, 598; *Johnson v. Brown*, 130 Ind. 534, 536; *Evansville, etc., R. Co. v. Fetting*, 130 Ind. 61, 62; *Cincinnati, etc., R. Co. v. Howard*, 124 Ind. 280, 282, 8 L. R. A. 593, 19 Am. St. 96; 2 Burns Dig., p. 648; 1 Woollen's Dig. pp. 636, 637, par. 7922. It is equally well settled that objections to the admission of evidence not made in the court below will not be considered on appeal. *Stout v. Rayl*, 146 Ind. 379, 386; *Indiana, etc., Co. v. Wagner*, 138 Ind. 658, 663, and cases cited; *Board, etc., v. O'Connor*, 137 Ind. 622, 637, 638; *Bass v. State*, 136 Ind. 165, 170, 171; *Chandler v. Beal*, 132 Ind. 596, 597, and cases cited; *Wood v. State, ex rel.*, 130 Ind. 364, 366; *Bingham v. Walk*, 128 Ind. 164, 173; *Louisville, etc., R. Co. v. Rush*, 127 Ind. 545, 550.

The State was permitted over the objection of appellant to prove that the Samuel H. Marshall who was jointly indicted with appellant had in his possession on February 11, 1898, the next day after it is alleged the murder was committed, a considerable sum of money in gold, silver and paper, the largest gold piece being \$20 and the largest bill being \$100; that on February 14, 1898, a few days after, he had in his possession \$300, and in addition to said sum he had quite a large amount of money. The court at the proper time gave the jury the following instructions in regard to this evidence.

“(24) Some testimony has been admitted tending to show that Samuel H. Marshall, who was jointly indicted with the defendant for the murder, shortly after the alleged murder was committed, had in his possession large sums of money, which it is claimed by the State was the property of

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the deceased. This fact, if it has been proved, is proper for you to consider, together with all the other facts and circumstances proved on the trial, in determining the guilt or innocence of the defendant; if you further find that said money, or any part thereof, was obtained or procured by said Marshall from the deceased as the fruits of a conspiracy, theretofore entered into, by and between the defendant and said Marshall or by and between the defendant, Marshall and some other person or persons, for the robbing and murder of the deceased or for the burglarizing the house of the deceased, and said facts, if any such facts have been proved, must be considered by you, with all the other facts and circumstances proved, in determining the guilt or innocence of the defendant, whether the defendant was or was not present at the time said Marshall was seen with said money or any part thereof in his possession." The giving of this instruction is also assigned as a cause for a new trial.

Appellant insists that "the court erred in admitting this evidence and in giving said instructions for the reason that the appellant was not present, and was not bound by the acts of Marshall after the crime was committed. That the conspiracy, if any, between appellant and Marshall ended with the commission of the crime, and the acts and declaration of a conspirator, after the criminal enterprise is ended, are not admissible in evidence against another conspirator." It is true that the declarations of one conspirator, made after the consummation of the conspiracy, are not admissible in evidence against another conspirator, but as to the acts and appearance of one conspirator after the criminal enterprise has ended being admissible against a co-conspirator, there is some conflict in the authorities. The evidence objected to, however, was not declarations or acts of Marshall, but merely that he had in his possession money, bills, and gold, of the same denomination and kind shown to have been in the possession of Mrs. Stolz before her death.

The rule urged by appellant in regard to the declarations

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and acts of a conspirator made after the object of the conspiracy has been accomplished has no application to such evidence. The evidence was concerning a physical fact, and tended to prove the guilt of Marshall, and when considered in connection with all the other evidence in the case also tended to prove the guilt of appellant. There was no doubt that a homicide had been committed. The question of the guilt or innocence of appellant was to be determined by the jury. There was evidence tending to show that three persons were present at the commission of the crime, and any fact tending to connect any one of them with the crime was competent evidence against the others. That evidence of this character is admissible is well settled. *Frazier v. State*, 135 Ind. 38, 40, 41; *Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078; *St. Clair v. United States*, 154 U. S. 134, 149, 14 Sup. Ct. 1002, 38 L. Ed. 936; *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216; *Angley v. State*, 35 Tex. Cr. 427, 34 S. W. 116; *Pier-son v. State*, 18 Tex. App. 524; *Mimms v. State*, 16 Ohio St. 221; *Allen v. State*, 80 Tenn. 424; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *Clark v. State*, 28 Tex. Cr. App. 189, 12 S. W. 729, 19 Am. St. 817; *Jackson v. State*, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. 839; *Pace v. State*, (Tex. Cr. App.), 20 S. W. 762; *Conde v. State*, 33 Tex. Cr. Rep. 10, 24 S. W. 415; *Thompson v. State*, 35 Tex. Cr. Rep. 511, 34 S. W. 629; *Armstrong v. Commonwealth* (Ky. 1895), 29 S. W. 343; *Watt v. People*, 126 Ill. 9, 18 N. E. 340.

In *Fitzpatrick v. United States*, 178 U. S. 304, Fitzpatrick and two others, Brooks and Corbett, were indicted for murder committed in Alaska. The defendants obtained separate trials. As to the admissibility of evidence, the Supreme Court of the United States said: "The testimony to which objection was made was that of Ballard, a soldier on guard duty at Dyea on the night of the occurrence, who testified that about 2 o'clock in the morning he heard four or

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five shots from the direction of Roberts' cabin [the place where the murder was committed] and the Wonder Hotel and that some fifteen or twenty minutes or half an hour thereafter, a man came to him. 'I was in the cabin, and he rapped on the door, and I went and opened the door for him, and he said he would like to get a doctor. He was shot. I directed him to the hospital in town, and he went that way.' Witness said that he did not know the man, but was afterwards told that his name was Corbett. He was brought into court, but witness could not indentify him with certainty. Objection was also made to the testimony of Dr. Price, who swore that about 3 o'clock in the morning Corbett applied to him for medical assistance; that he was wounded in the right shoulder, and witness was in attendance upon him about three weeks or a month. Also to the testimony of John Cudihee, deputy United States marshal, who arrested Fitzpatrick, Brooks and Corbett the day of the murder, and made an investigation. He found Roberts in his cabin dead, then went to Fitzpatrick and Corbett's cabin and found there a lot of shoes and clothing covered with blood. The witness produced the shoes in evidence, pointed out which pair was Fitzpatrick's and which was Corbett's, explained that Fitzpatrick had identified the shoes in his office, and pointed out which pair was Corbett's and which was his. Witness also pointed out the blood stains on both shoes. Corbett's shoe fitted the footprints in the sand which the witness found in the rear of Roberts' cabin, where the shooting occurred. The shoe had hobnails in it, and the heel of one was worn off so the print in the sand was a peculiar one. Objection was made to the admission of any testimony relating to the acts of Corbett, and especially that which occurred after the alleged crime had been committed. No direct testimony appears in the record showing the presence of Corbett at the cabin before, during or after the commission of the crime for which Fitzpatrick was then on trial. Had the statement of Corbett, that he was shot, and inquir-

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ing for a doctor, tended in any way to connect Fitzpatrick with the murder, it would doubtless have been inadmissible against him upon the principle announced in *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343, that statements made by one of two joint defendants in the absence of the other defendant, while admissible against the party making the statement are inadmissible against the other party. In that case declarations of Hansen connecting Sparf with the homicide there involved, tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. This is a familiar principle of law; but the statement of Ballard was not within this rule. Corbett had evidently been wounded, and was asking for a doctor. His accompanying statement that he was shot was clearly competent to explain his condition, and had no tendency whatever to connect Fitzpatrick with the transaction. This statement, as well as that of Dr. Price, to the effect that he found Corbett with a wound in his right shoulder, and that of Cudihee as to finding a lot of shoes and clothing covered with blood, and connecting one pair of these shoes with the footprints found near Roberts' cabin, were all facts connected with the crime which the government was entitled to lay before the jury. Fitzpatrick and Corbett roomed together. Their bloody clothes and shoes were found in their cabin the morning after the murder. Brooks had roomed with them. Brooks and Corbett in their affidavit for a continuance swore in effect that they were together that night, and attempted to establish a joint alibi. There was no doubt that a homicide had been committed, and it was the province of the jury to determine whether the defendant was a guilty party. Any fact which had a bearing upon this question, immediate or remote, and occurring at any time before the incident was closed, was proper for the consideration of the jury. Of course, statements made in the absence of Fitzpatrick implicating him with the murder would not be competent, but none such were admit-



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ted; but any act done, whether in Fitzpatrick's presence or not, which had a tendency to connect him with the crime, was proper for the consideration of the jury, and the fact that Corbett was not then on trial is immaterial in this connection. As there was some evidence tending to show a joint action on the part of the three defendants, any fact having a tendency to connect them with the murder was competent upon the trial of Fitzpatrick. The true distinction is between statements made after the fact, which are competent only against the party making the statement, and facts connecting either party with the crime which are competent as a part of the whole transaction. In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed. It may have a bearing only against the party doing the act, or it may have a remoter bearing upon the other defendants; but such as it is, it is competent to be laid before the jury."

In *People v. Cleveland*, 107 Mich. 367, Cleveland was prosecuted jointly with Mehan and Swidenski for assault with intent to kill, and was tried separately. As to the admissibility of evidence in Cleveland's trial of the acts, appearance and condition of the other two in Cleveland's absence, the court said: "It is apparent from the testimony that the three parties, when they left Jackson, had arranged to engage in this robbery. We think there was evidence for the jury to determine the identity of the three on their way, and there can be little question from the testimony that they were at the store; two of them entering it, and one remaining outside. Mr. Weatherwax testified that he recognized respondent, Cleveland, as the masked man, who fired one of the shots. By the proofs it was established that a prior arrangement had been made to commit the robbery, and the arrangement had been carried out so far as they were able to do so. It was therefore proper to show the condition of



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Mehan, who was not on trial, for the purpose of establishing his identity as one of the men who accompanied respondent, Cleveland, from Jackson to Somerset Center, thus identifying the latter's connection with the robbery. In the case of *Ryan v. State*, 83 Wis. 486, the charge was burglary. Evidence was admitted, under objection, showing the movements and conduct of each of three persons charged with the crime on the next morning after the robbery, and after they had separated. The prosecution having shown that these persons were seen together shortly before the crime, this evidence was held competent. It is true that, when the subsequent facts sought to be shown are in the nature of a narrative by one of the parties to the transaction, such narration is inadmissible as evidence against a co-respondent; but in the present case no such statements were sought to be shown, and it was competent to show the condition of any one of the three, immediately after the affray, which would throw any light upon the question of the identity of Cleveland as taking part in the crime charged."

In *Pierson v. State*, 18 Tex. App. 524, Bob Pierson and his brother, Tom, were jointly indicted for murder. Separate trials were granted. On Bob's trial the question of the admissibility of evidence tending to show what occurred at Tom Pierson's house on the morning after the murder was raised, and as to this evidence the court of appeals of Texas said on p. 561: "It was not error to admit the testimony of the witness Odenheimer as to what he observed at Tom Pierson's house on the morning after the murder; nor to admit the testimony of the witness Tulk as to finding pistols at Tom Pierson's house on said morning. There was positive evidence that Tom Pierson and the defendant, acting together, committed the murder. Whilst the declarations of Tom Pierson, made after the consummation of the murder, and when the defendant was not present, would not be admissible as evidence against the defendant, still any fact or circumstance which would tend to prove the guilt of Tom

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Pierson would also tend to prove the guilt of the defendant, and would be admissible against him, the evidence having directly connected them together in the commission of the offense. Such facts and circumstances would be corroborative of the direct evidence of their joint guilt. That Tom Pierson was found in bed at home on the next morning after the murder, while all the other members of the family were up, and that three pistols were found at his house, one of which had the appearance of having been recently discharged, were circumstances which, when considered in connection with the other evidence in the case, were relevant to prove the guilt of this defendant. They were independent physical facts of an inculpatory nature, and were not acts and declarations of a co-conspirator, transpiring after the consummation of the crime."

In *Jackson v. State*, 28 Tex. App. 370, Jackson was indicted for burglary. On the trial, his brother-in-law, Kilby, who appears not to have been indicted, was implicated in the burglary. It being contended that stolen sacks, the fruits of the crime, found in Kilby's possession, were not proper evidence against Jackson, the court said: "But it is insisted that the court erred in allowing evidence to go to the jury of the finding of the sack and what transpired at the time, the defendant not being present. This evidence was admissible and legitimate as a circumstance tending to connect defendant with the burglary, the sack being one of the fruits of the crime. Burrill on Cir. Ev. 445, 447. For the same reason it is objected that the court erred in allowing evidence of the finding of some of the stolen sacks at the house of Kilby several days after the commission of the burglary, when neither Kilby nor defendant were present, and the additional objection urged to this evidence is that the sacks were found after the conspiracy (if any had ever existed between defendant and Kilby) had been consummated, and that no act or fact connecting Kilby with the crime, done or ascertained after consummation of the con-

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spiracy, could be used as evidence against or affecting this defendant. As stated above, the evidence in our opinion amply established the conspiracy and acting together of the parties in the crime. The sacks found at Kilby's were fruits of the crime, and 'any fact or circumstance which would tend to prove the guilt of the codefendant would also tend to prove the guilt of the defendant, and would be admissible against him.' "

In *Conde v. State*, 33 Tex. Cr. Rep. 10, Gregoria, Ruperto and Esteban Conde were jointly indicted for murder. Ruperto and Esteban were placed on trial. The state proved that about a week after the murder Esteban was seen at a dancing party wearing the sash of deceased, and that after the murder Esteban and Gregoria sold the gun of deceased. In both instances Ruperto was not present. It is urged that these facts were inadmissible as against Ruperto. In discussing the admissibility of said evidence the court said on p. 11: "The evidence adduced on the trial sufficiently shows that these three parties, father and two sons, acted together in committing the murder. While the acts, conduct and declarations of one co-conspirator, made after the consummation of the conspiracy, can not be used as evidence against another co-conspirator, yet any fact or circumstance which would tend to prove the guilt of the codefendant, would also tend to prove the guilt of the defendant, and would be admissible against him. *Pierson v. State*, 18 Tex. Cr. App. 524; *Clark v. State*, 28 Tex. Cr. App. 189. The possession of the sash by Esteban Conde, as well as the possession of the gun by Gregoria and Esteban Conde, would be admissible to prove their guilt, and would also be admissible for the purpose of proving the guilt of Ruperto Conde, and was therefore admissible against him. They were not acts, declarations or conduct of the co-conspirators transpiring subsequent to the crime, but were physical facts, independent and inculpatory in their nature, and were the fruits of the crime. The gun was seen in the possession of de-

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ceased the day of and prior to his disappearance, and the sash he had been wearing for two years prior to his death. *Pace v. State* (Tex. Civ. App.), 20 S. W. 762. The testimony was clearly admissible."

In *Armstrong v. Commonwealth* (Ky.), 29 S. W. 343, Armstrong and five others were indicted for arson. Armstrong was tried separately. The court said: "The court permitted a witness to testify that he saw James Collins, one of the alleged conspirators, at home the next day after the house was burned, in bed, asleep, from which circumstance it might be inferred he was present when the crime was committed, the night before. Appellant was also at the house of Collins on that occasion. But whether his presence makes evidence of the fact that Collins was in bed, asleep, competent against him, if not otherwise so, we need not consider, because, in our opinion, the conspiracy having been shown, the commonwealth had the right to prove the fact in question. Strictly, the conspiracy was not then pending, nor could the fact of Collins' going to bed at that time of day be regarded as in furtherance of the original design. But it was a circumstance tending to show he was present when the house was burned, and therefore fit to be proved, just as it would have been proper to prove he went to bed on account of a gunshot wound, if McGuire had fired at the conspirators in the act of burning his house." It is clear that the court did not err in admitting said evidence, or in giving said instruction.

Frank Markle, a witness for the State, over the objection of appellant testified to the declarations made by said Marshall at the paper-mill at Muncie on the night of Wednesday, February 9, 1898, before the murder of Mrs. Stolz. The declarations were properly admitted as the declarations of a co-conspirator before the commission of the crime. Appellant, however, insisted that the same were improperly admitted in this case, because said Samuel H. Marshall had been tried and acquitted before appellant's trial, and before

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said evidence was admitted. No proof of said fact had been made or offered when Frank Markle testified to said declarations. But if said proof had been made, yet the evidence was properly admitted. It is true that where only two persons are connected in a conspiracy, and they are charged with that offense, and one is acquitted, that on proof of such acquittal the other must also be acquitted. This is upon the ground that it takes two or more persons to commit a conspiracy. But where two or more persons are charged with a substantive offense, not a conspiracy, and it appears that the same was committed in pursuance of a conspiracy, the acts and declarations of one shown to have been engaged in the conspiracy to commit such substantive crime are admissible in evidence on the trial of the other defendant, notwithstanding the person whose declarations are sought to be proved had been previously acquitted. *Holt v. State*, 39 Tex. Cr. Rep. 282, 45 S. W. 1016, 46 S. W. 829; *People v. Kief*, 126 N. Y. 661, 27 N. E. 556.

Appellant assigns as his 105th cause for a new trial, that the court erred in refusing to permit him to introduce in evidence a certified copy of the record of the trial and acquittal of Samuel H. Marshall in the Randolph Circuit Court. No such record, however, is in the bill of exceptions. The rule is, that where a written instrument is offered in evidence and excluded, it must be brought into the record in order to present any question on the ruling excluding it. *Roseboom v. Jefferson School Tp.*, 122 Ind. 377, 378; *Rucker v. Steelman*, 97 Ind. 222, 223. There being nothing in the record to sustain said cause for a new trial the same must fail. It is clear, however, from what we have already said concerning the acquittal of Marshall, if he was acquitted as claimed, that said record was properly excluded. *Holt v. State*, 39 Tex. Cr. Rep. 282; *People v. Kief*, 126 N. Y. 661.

It is also insisted by appellant that the verdict is contrary to the evidence and contrary to law. A part of the evidence

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has already been set out and we do not deem it necessary to extend this opinion by stating the remainder. We have, however, carefully examined all the evidence and are satisfied that the same fully sustains the verdict, and that appellant was properly convicted.

After defining what it takes to constitute a conspiracy, the court in instruction seventeen informed the jury, in substance, that "evidence in proof of conspiracy will generally be circumstantial, and it is not necessary for the purpose of showing the existence of the conspiracy for the State to prove that the defendant and some other person or persons came together and actually agreed upon a common design and purpose, and agreed to pursue such common design and purpose, in the manner agreed upon. It is sufficient if such common design and purpose is shown to your satisfaction by circumstantial evidence."

In another instruction (18) the court said, that "while it is necessary, in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose; that such common design may be regarded as proved if the jury believe from the evidence that the parties to such conspiracy were actually pursuing in concert the common design or purpose whether acting separately or together by common or different means provided that all were leading to the same unlawful result." The giving of each of said instructions was assigned as a cause for a new trial. The law as declared in said instructions is sustained by many authorities. 3 Greenleaf on Ev. §93; 3 Russell on Crimes (9th Am. ed.), marginal pp. \*165, \*166; Wharton's Crim. Law (9th ed.), §§1398, 1399, 1401; Wharton Crim. Ev. §§32, 698; *McKee v. State*, 111 Ind. 378, 383; *Archer v. State*, 106 Ind. 426, 432; *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *People v. Arnold*, 46 Mich. 268,

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277, 9 N. W. 406; *Dayton v. Monroe*, 47 Mich. 193, 194, 196, 10 N. W. 196; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320, 395, and note p. 476.

Appellant contends that each of said instructions is erroneous for the further reason that it is not stated that the circumstances or facts establishing the conspiracy must be proved beyond a reasonable doubt. It will be observed that the indictment did not charge appellant with the offense of conspiracy, but with the crime of murder in the first degree. It was not necessary, therefore, that the elements or facts constituting the crime of conspiracy be proved beyond a reasonable doubt. It was sufficient if each essential element of the crime charged in the indictment be so proved. That such proof was required as to the crime charged, the jury were fully informed by other instructions. The court, however, did inform the jury, in another instruction, "if they believed beyond a reasonable doubt, from all the facts and circumstances in evidence, that appellant and said Marshall, or appellant, Marshall, and some other person or persons, entered into a conspiracy to commit the offense charged, that such proof is sufficient to establish the existence of such conspiracy, though no direct evidence showing such conspiracy was introduced." In another instruction the court informed the jury that "the declarations of Marshall before the crime charged was committed, in the absence of appellant, were proper to be considered by them with all the other facts and circumstances proved on the trial, in determining the guilt or innocence of appellant, if the jury believe from the evidence beyond a reasonable doubt that appellant prior to the murder entered into a conspiracy with said Marshall to rob or murder or to burglarize the house of the deceased, and that such declarations were made in furtherance of such conspiracy, or common design, and the fact, if it be a fact, that Marshall has been tried and acquitted of said charge, will not make such statements or declarations incompetent if such conspiracy has been shown by the evidence." The



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instructions are to be read and construed together as an entirety (*Shields v. State*, 149 Ind. 395, 406, 407-410), and when so construed it appears that on the subject of proof of the facts constituting the conspiracy they were more favorable to appellant than he was entitled to demand.

It is clear from what we have already said on the admissibility of the record of Marshall's acquittal, that the court did not err in informing the jury in the instructions last quoted, that the declarations of Marshall referred to in said instructions were to be considered by the jury even if Marshall had been tried and acquitted on said indictment, if the conspiracy was proved by the evidence. *Holt v. State*, 39 Tex. Cr. Rep. 282; *People v. Kief*, 126 N. Y. 661.

Appellant complains of certain instructions given at the request of the State on the subject of reasonable doubt. Some of said instructions complained of may be ambiguous and contain verbal inaccuracies, and if standing alone might be objectionable. It is settled law in this State, however, that instructions are considered with reference to each other, and as an entirety, and not separately, or in dissected parts; and if the instructions as a whole correctly and fairly present the law to the jury, even if some particular instruction, or some portion of an instruction standing alone, or taken abstractly, and not explained or qualified by others may be erroneous, it will afford no ground for reversal. *Shields v. State*, 149 Ind. 395, and cases cited; *Rains v. State*, 152 Ind. 69. Mere verbal inaccuracies in instructions, or technical errors in the statement of abstract propositions of law, furnish no grounds for reversal, when they result in no substantial harm to the defendant, if the instructions, taken as a whole, correctly state the law applicable to the facts of the case, nor is the giving of an erroneous instruction reversible error when it appears that the substantial rights of the defendant have not been prejudiced thereby. *Shields v. State*, *supra*, pp. 406, 408, and cases cited. *Harris v. State*, 155 Ind. 265.



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Two instructions on the subject of reasonable doubt stated the law as declared in *Bradley v. State*, 31 Ind. 492. One of said instructions was requested by appellant.

The court gave an instruction at request of appellant which informed the jury in substance that in a criminal case the law contemplates the concurrence of twelve minds in a conclusion of guilt before a conviction could be had, and that each juror must be satisfied, beyond a reasonable doubt, of the defendant's guilt, before, under his oath, he can consent to a verdict of guilty, the same being in the language used in *Castle v. State*, 75 Ind. 146.

The jury was instructed at request of appellant that he "is presumed to be innocent and that this presumption continued through the trial and until overthrown by the evidence, and that it is the duty of the jury, if it can consistently be done, to reconcile the evidence upon the theory that the defendant is innocent."

Although there may be verbal inaccuracies and ambiguities in some of said instructions complained of, yet when they are read and construed in connection with the instructions just mentioned and the other instructions on this subject, and all the instructions given are considered and construed together as an entirety, it is clear that the same did not prejudice the substantial rights of appellant. Moreover, the verdict was right, under the evidence, and in such case we are properly required to disregard such errors. *Stanley v. Dunn*, 143 Ind. 495, 501; *Mode v. Beasley*, 143 Ind. 306, 334, and cases cited; *Swaim v. Swaim*, 134 Ind. 596, 599, and cases cited; *Woods v. Board, etc.*, 128 Ind. 289, 292, and cases cited; *Reed v. State*, 141 Ind. 116, 123; *Strong v. State*, 105 Ind. 1; *Epps v. State*, 102 Ind. 539; *Galvin v. State*, 93 Ind. 550; Gillett on Crim Law (2nd ed.), §917.

It is further contended by appellant that the court erred in refusing to give certain instructions asked by him. The Attorney-General insists that there was no available error in this, for the reason that the instructions were not signed

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by appellant or his counsel as required by subdivision six of §1892 Burns 1901, §1823 R. S. 1881 and Horner 1897. Said instructions not being signed as required by the statute, no available error was committed in refusing the same. *Glover v. State*, 109 Ind. 391, 403.

We have, however, examined the instructions requested by appellant, and refused, and find that so far as they correctly expressed the law they were substantially embraced in those given by the court. Such being the case, appellant would have no ground for complaint, even if the request for said instructions had been properly made. *Delhaney v. State*, 115 Ind. 499, 501; *Stephenson v. State*, 110 Ind. 358, 374, and cases cited; *Siberry v. State*, 149 Ind. 684, 694; *Anderson v. State*, 147 Ind. 445, 450; *Hinshaw v. State*, 147 Ind. 334, 387.

Upon a careful review of the entire record we are convinced that the verdict was right upon the evidence, that a correct result was reached, and that no reason exists for a reversal of the judgment.

Judgment affirmed.

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**SUDBURY v. BOARD OF COMMISSIONERS OF MONROE COUNTY.**

[No. 19,072. Filed November 26, 1901.]

**FEES AND SALARIES.—Act of 1891.—Salary of County Treasurer.—Publication and Distribution of Acts.**—The fee and salary act of 1891 (Acts 1891, p. 424), provided that where a county officer had been elected before “the taking effect” of the act he should not be subject to the provisions thereof. As to county treasurers, this act was unconstitutional until amended by the act of 1893 (Acts 1893, p. 142). *Held*, in a construction of the act, that the words “taking effect” did not mean “become valid and operative” in all its parts, but referred to the taking effect upon its publication and distribution with other laws of the legislative session of 1891, and that the salary of a county treasurer elected after publication and distribution of the act of 1891, but before the amendment of 1893, was governed by the act of 1891. *pp. 449-452.*

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COUNTY. — *Claims. — Allowance by Commissioners.* — In respect to claims against a county, the board of county commissioners acts in an administrative capacity, with power only to state the amount of legal claims chargeable against the county, and the finding of the board is but *prima facie* evidence of the correctness of the claim. p. 453.

SAME. — *Allowance by Commissioners of Illegal Claim to Treasurer.* — The allowance by a board of county commissioners to a county treasurer of salary and fees to which he was not legally entitled, but which was allowed under a statute which the commissioners thought to be in force, was not a voluntary payment under mistake of law, but was in legal effect a withholding of the county's money by the treasurer with the connivance of the board of commissioners. pp. 453, 454.

OFFICERS. — *Right to Office not Contractual.* — The right to public office is not contractual, and the rule of law that after a statute has been construed the construction becomes, as to contract rights, a part of the statute, is not applicable. pp. 454-456.

COUNTY. — *Recovery of Fees and Salary Improperly Allowed County Treasurer.* — County commissioners, in view of the decision of the Supreme Court holding the fee and salary act of 1891 unconstitutional as to county treasurers, made allowances to the treasurer in accordance with the prior act of 1879. Three months before the close of such treasurer's term of office the Supreme Court modified its former decision and held that the act of 1891, as amended by the act of 1893, was valid as to county treasurers, and the commissioners made settlement for the last three months in accordance with the act of 1891. *Held*, that the county in an action against the treasurer could recover the excess which was paid under the act of 1879 over that which should have been paid under the act of 1891. pp. 454-457.

SAME. — *Allowing Claim to County Treasurer. — Entry of Public Necessity.* — In an action to recover from an ex-county treasurer an excess of salary, where an answer alleged that the county commissioners had entered an order declaring that public necessity required the services of a treasurer, and thereafter all allowances should be made as a matter of indispensable necessity, but it was also alleged in the answer that the excessive payments were made under a statute which the commissioners thought to be in force, the payment was under the statute, and the public necessity order was no justification for the excessive payments, the reliance on the statute negating the idea of public necessity. pp. 454-457.

APPEAL. — *Evidence. — Sufficiency.* — In an action to recover from an ex-county treasurer an excess of fees and salary, the want of evidence to support a finding that he was allowed a certain sum on a

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certain date is not material, where it was admitted that upon final settlement the amount received by him exceeded that to which he was entitled by the amount represented by the judgment. pp. 456-458.

From Monroe Circuit Court; *W. H. Martin*, Judge.

Action by the board of commissioners of Monroe county against Tolbert H. Sudbury ex-county treasurer, to recover an excess of salary paid. From a judgment for plaintiff, defendant appeals. *Affirmed.*

*H. A. Lee, L. M. Grimes, J. E. Henley and J. B. Wilson*, for appellant.

*H. C. Duncan and I. C. Batman*, for appellee.

HADLEY, J.—Appellant was elected treasurer of Monroe county at the November election, 1892, entered upon his office September 7, 1893, and continued therein to September 7, 1895. The fee and salary act of 1891 (Acts 1891, p. 434), fixed the salary of the treasurer of Monroe county at \$1,800 per annum. The acts of 1879 (Acts 1879, p. 141), fixed the same at \$800 and certain commissions. For the official year ending September 7, 1894, appellant presented to the board of commissioners of the county, each quarter, his verified account for salary as treasurer as follows: December 7, 1893, \$450; March 7, 1894, \$450; June 8, 1894, \$450; September 8, 1894, \$450, which was allowed and paid. Subsequently he presented and at the times noted was allowed and paid for official services the following sums: May 8, 1895, to commission on taxes from beginning of term to January 1, 1895, 1 per cent. and 6 per cent., \$1,749; to commission on taxes collected from January 1, 1895, to May, 1895, \$859; to salary for the first year, \$800; to salary from September (December), 1894, to March 5, 1895, \$400; total, \$3,808. Credit by amount received from the county to date, \$2,200. Balance due, \$1,608, which balance was allowed and paid. June 3, 1895, to three months' salary, \$200; to commissions for collecting \$1,354, delinquent taxes since May settlement, 6 per cent., \$81.25. And

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on September 8, 1895 (at close of his term), he presented and was allowed on account of salary for quarter ending September 7, 1895, \$450; on account of commission for collection of delinquent taxes since June, 1895, \$163.95.

It is worthy of note that for the first year's services as treasurer appellant claimed and was allowed his salary under the act of 1891. On May 8, 1895, he receded from his claim and settlement for the first year, and then presented and was allowed his claim for all services rendered previous to that date, under the act of 1879. From June, 1895, to September, 1895 (the end of his term), he again claimed and was paid his compensation under the act of 1891.

This suit was instituted by appellee to recover from appellant the sums allowed him in excess of the amount to which he was entitled under the provisions of the act of 1891. The complaint is in two paragraphs. Appellant's demurrer to the second paragraph was overruled. Answer in five paragraphs. The first is a general denial. Appellee's separate demurrer to each the second, third, fourth, and fifth paragraphs was sustained. Trial by the court. Special finding of facts, the substance of which is set forth above. Finding and judgment for appellee. Appellant's motion for a new trial was overruled. Error is assigned upon all adverse rulings.

The complaint proceeds upon the theory that appellant was entitled to such compensation only as was provided by the act of 1891, and that the sum received in excess of that amount is recoverable under §6549 Burns 1901. Appellant vigorously assails the act of 1891, and the amendatory act of February 25, 1893 (Acts 1893, p. 142), as being in contravention of §22, article 4, of the State Constitution, which forbids local and special legislation for the regulation of county officers' compensation. His objections, however, have all been fully considered in the previous decisions of this court, and the views heretofore announced must now be

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regarded as the settled law upon the question involved. *Harmon v. Board, etc.*, 153 Ind. 68; *Legler v. Paine*, 147 Ind. 181; *Walsh v. State, ex rel.*, 142 Ind. 357; *State, ex rel., v. Krost*, 140 Ind. 41; *Henderson v. State, ex rel.*, 137 Ind. 552, 24 L. R. A. 469.

It is also argued that, conceding the act of February 25, 1893, amending §93 of the act of 1891, rendering the latter act constitutional and valid as to county treasurers, from and after the taking effect of the amendment (as held in the *Walsh* case), it does not affect appellant, for the reason that he was elected to his office before the act of 1891 became a valid law as to county treasurers, and that by the terms of §136 the same does not apply to him. This question becomes of importance because of the peculiar language of §136 of the act of 1891, viz.: "Where any clerk, auditor, recorder, treasurer, or sheriff has been elected by the people of his county before the taking effect of this act, such officer so elected during the time that he holds such term shall not be subject to the provisions of this act. He shall hold such term of office and perform the duties thereof and receive the compensation prescribed by the law the same as if this act had not passed." There being no emergency clause in the act of 1891, and none in the amendatory act of 1893, this court knows judicially that the former act went into force June 3, 1891, and the latter May 18, 1893. 1 Burns 1901, p. 96.

Appellant was elected in November, 1892, took his office in September, 1893, and left it in September, 1895. It may be well to observe that appellant was elected *after* the session laws of 1891, of which the particular act in question was a part, had taken effect, and that the amendment of February, 1893, was also in full force when he entered into his office.

The solution of the question must turn upon the meaning of the words "before the taking effect of this act." If these words mean that the act of 1891 shall not affect any clerk, auditor, treasurer, etc., who was elected at any time before

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the provisions in regard to the compensation of his particular office had become valid and operative, the question is with the appellant, because under the decision in the Walsh case the act of 1891 was not valid and operative against treasurers until from and after May 18, 1893, which was subsequent to his election; but if it should be held that the words were used in a technical sense, and refer to the taking effect of the act as an entirety upon its "publication and circulation" with the other laws of the session of 1891 as provided by §28, article 4, of the Constitution, then there is no just basis for appellant's contention. The language of the Constitution is: "No act shall take effect until the same shall have been published and circulated in the several counties of this State by authority, except in case of emergency; which shall be declared in the preamble or in the body of the law." But for this provision, legislation would be valid and binding immediately upon its passage and approval by the Governor, or its passage over the Governor's veto. It was adopted obviously for the purpose of giving notice to the people of the State before exacting obedience to new laws by suspending the operation of such laws until they could be printed and deposited in places accessible to the citizens of the several counties. It is a method of giving effect to legislation required by the Constitution, and the only method in the absence of a declared emergency, and of which the lawmakers must take notice in framing an act.

It will not do to say that within the meaning of the Constitution an act may go into effect by piecemeal. There is no warrant for more than a single distribution and publication by authority, and no other means, in the absence of an emergency, to give effect to legislation. Under the Constitution, "except in emergency cases, a law takes effect from the time of its distribution by authority in all counties of the State." *State, ex rel., v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Dowdell v. State*, 58 Ind. 333, 336; *State, ex rel., v. Board of Pharmacy*, 155 Ind. 414, 416.

The publication of an act in the constitutional mode, and



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the taking effect thereof, are concurrent acts, and *eo instanti* the particular legislation has all the force and virtue of law it ever attains in the form of its enactment. Its application to persons and things may not be uniform as to time, but the status of all subjects affected is fixed, to be operated upon at the time and in the manner prescribed by the law.

It can not be doubted that the legislature intended to make the act of 1891 affect all county officers named, and to make §136 apply impartially to such clerks, auditors, recorders, treasurers, and sheriffs as had, at the time of the passage of the act, been elected by the people, counting upon the emoluments as fixed by law at the time of their election. There is manifest equity in providing, as was done, that those who had been induced to become candidates for office, and who had incurred the labor and expense of a campaign, relying upon the compensation fixed by existing laws, should not be subjected to a change in the law which was supposed materially to reduce that compensation. This consideration, however, could only relate to those who stood elected at the time the law was changed, or supposed to be changed; surely not to those who became candidates and were elected after the change was attempted, but who from inadvertence or misprision were not brought within the provisions of the new law for two years afterwards. This latter class could not have been in the mind of the lawmakers when §136 was framed. It must therefore be held that the words "before the taking effect of this act" as employed in §136 of the act of 1891 were used in their technical sense, and had reference to the time when the particular act, as enacted, should be distributed by authority to the several counties of the State. This we have seen was on June 3, 1891, and §136, in legal effect, is the same as if it read: Where any \* \* \* treasurer \* \* \* has been elected by the people of his county before June 3, 1891, such officer shall not be subject to the provisions of this act.

When appellant entered into his office, the amendment of February, 1893, had taken effect, and at that time the act



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of 1891 stood as if the infirmity of §93 had never existed, and it is by this law that the full measure of his compensation, as treasurer, must be computed.

(2) It is also claimed that the complaint is insufficient for the additional reason that it shows that appellant's claim, upon due presentation to the board of commissioners, was, upon consideration, allowed, and that such allowance being unchallenged by a taxpayer's appeal, the same is *res adjudicata*, and for the further reason, if the allowance was in fact erroneous, it was free from fraud and was a voluntary payment under a mistake of law.

In certain instances, not necessary to mention, boards of commissioners have such judicial powers as that their judgments are reviewable upon appeal only, and can not be collaterally attacked, but in respect to claims against a county, since the legislation of 1885 (Acts 1885, p. 80) it has been uniformly held that such boards act in an administrative capacity, in the nature of an auditing committee, with power only to state the amount of legal claims chargeable against the county, and whose finding is but *prima facie* evidence of the correctness of the claim. *Board, etc., v. Heaston*, 144 Ind. 583, 55 Am. St. 192; *Bass Foundry, etc., Works v. Board, etc.*, 115 Ind. 234; *Board, etc., v. Nichols*, 12 Ind. App. 315, 54 Am. St. 528; *Board, etc., v. Stock*, 11 Ind. App. 167.

It is an essential condition precedent to the jurisdiction of circuit courts, that claims of every character against a county be first filed with the county auditor and presented to the board of commissioners; and if the claim is disallowed, in whole, or in part, the claimant has his option to appeal, or bring an original action in the circuit court against the county. §§7845, 7846, 7847, 7856 Burns 1901; *Myers v. Gibson*, 152 Ind. 500, and cases cited.

It follows from this that a claimant, who has failed before the board of commissioners, and brings his action in the circuit court for the same matters, cannot be defeated by setting up against him the conclusion of the commissioners,

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call it what you may, and if he cannot be bound by the action of the board, surely the county, the other party to the controversy, cannot be. The effect of an adjudication must be mutual. "Both litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either." Freeman on Judgments (4th ed.) §189; *Simpson v. Pearson*, 31 Ind. 1.

The allowance of appellant's claim was not a voluntary payment under a mistake of law in the sense underlying the authorities cited by appellant. In fact it was not a payment at all by the county. The board of commissioners as agents of the county had no authority to permit appellant to retain as his own, or to allow him from the county treasury, moneys to which he was not legally entitled. Such boards may only do on behalf of the county such things as are expressly authorized by statute, and such as become essential to the performance of declared duties, which alone may arise by implication. *Board, etc., v. Heaston*, 144 Ind. 583; *Myers v. Gibson, supra*, at p. 505.

The commissioners of Monroe county had no authority to allow appellant a claim not "chargeable against the county." §7830 Burns 1894. Their doing so did not bind the county. It was no allowance or payment by the county. In legal effect the transaction was a withholding of the county's money by the appellant, with the connivance of the men composing the board of commissioners. The complaint is sufficient.

(3) The second paragraph of answer sets up the allowance by the commissioners as an estoppel against the county. The third charges that by the terms of §136, acts 1891, the provisions of said act do not apply to him, and that he charged and received only the compensation allowed by the act of 1879. The questions arising upon the second and third paragraphs are ruled by what has been above decided with respect to the sufficiency of the complaint.

In the fourth and fifth paragraphs of answer, which are in substance the same, it is alleged that appellant paid all fees collected into the treasurer's fund, and made quarterly

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reports; for more than a year he presented his claims under the law of 1879; part was allowed and the balance continued from term to term until the Supreme Court should rule upon the constitutional validity of the act of 1891, which was done November 27, 1894, adversely to the law in respect to county treasurers, in the case of *State, ex rel., v. Boice*, 140 Ind. 506. After the ruling in the Boice case, and before the Supreme Court on June 22, 1895, in the case of *Walsh v. State, ex rel.*, 142 Ind. 357, 33 L. R. A. 392, held the act of 1891 as amended in February '1893 to be constitutional and valid, to wit, on May 8, 1895, relying on the decision in the Boice case, he filed and was allowed his claim for all previous services under the act of 1879. Before making this allowance the commissioners entered an order declaring that public necessity required the services of a county treasurer, and that thereafter all allowances made to the county treasurer should be made as a matter of indispensable necessity; the allowance made him was reasonable, made at a regular session of the board with full knowledge of the facts, is unappealed from, and was voluntarily paid.

Upon these answers it is argued that it was the duty of the commissioners to abide the decision of the Supreme Court, and as appellant's claim was allowed by the board in accordance with the interpretation of the act of 1891, given in the Boice case, it was a valid adjudication and settling of his rights with respect to compensation, accruing prior, and before the Boice case was overthrown; and that the contrary interpretation subsequently made in the Walsh case did not affect his rights vested under the former decision. In support of this contention appellant cites *Myers v. Boyd*, 144 Ind. 496, and *Stephenson v. Boody*, 139 Ind. 60. The rule declared in these cases and many others that might be added is perhaps nowhere denied, but it is not applicable here because of the absence of the principle upon which it rests. The rule as approved in these cases is "that, 'after a statute has been settled by judicial construction, the construction becomes, so far as *contract* rights acquired under

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it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on *contracts* as an amendment of the law by means of a legislative enactment.' ” But public office is not a contract; it is in the nature of a trust, or agency. *Coffin v. State, ex rel.*, 7 Ind. 157.

The distinction between a contract and a public office is marked. If the former is not fully executed, the delinquent is liable and must respond in damages; while in the latter, the officer may lay aside his office, by resignation, at pleasure, and with it all further liability. For fifty-five years it has been held in this State that a county officer accepts his office subject to whatever regulations the legislature may afterwards make respecting it. New duties may be imposed upon an incumbent without additional compensation, and his compensation as fixed by law when elected may be either increased or decreased. It is settled that public office is accepted *cum onere*. *Gilbert v. Board, etc.*, 8 Blackf. 81; *Turpen v. Board, etc.*, 7 Ind. 172; *Walker v. Dunham*, 17 Ind. 483.

These answers do not count upon the public necessity order, for it is not claimed that any allowance was made appellant thereunder and it is expressly averred that the commissioners, believing him so entitled, paid him under the provisions of the act of 1879. If the act of 1879 authorized and measured his compensation, it is clear that there was no ground for a public necessity payment. §7853 Burns 1901, §5766 R. S. 1881 and Horner 1897.

We are not called upon to decide, and we do not decide, the effect upon an unchallenged allowance to a county treasurer, made upon final settlement of his accounts with the county, in the period intervening between the decisions in the Boice and Walsh cases, and which was according to the law as construed by the Supreme Court at the time of settlement, for in the special finding before us it is shown that the appellant remained in office for more than two months

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after the ruling in the Walsh case affirming the validity of the act of 1891, as amended in February, 1893, and modifying the opinion in the Boice case, had been announced, and made a final settlement of his accounts with the board in the full light of that case, and when the subject of his compensation for official services for his entire term was before the board and open to adjustment in accordance with the late exposition of the law. At that time it was clearly the right and duty of both the claimant and commissioners to correct all mistakes that had been made in the treasurer's accounts under the law as then declared. §§7913, 8003 Burns 1901; *Board, etc., v. State, ex rel.*, 106 Ind. 270; *Board, etc., v. State, ex rel.*, 103 Ind. 497; *Rogers v. State, ex rel.*, 99 Ind. 218; *Hunt v. State, ex rel.*, 93 Ind. 311.

In the latter case it is said: "The obligation upon county treasurers to pay over all public moneys in their hands is thus made a continuous obligation, and no previous fraudulent or mistaken settlement with the commissioners can be made effective as a discharge from that obligation."

In September, 1895, appellant had already received \$325.30 more than he was entitled to for his full term, but was then in the final settlement allowed and paid \$613.95 additional. This last allowance was not due or owing from the county and the commissioners had no authority to make it. §6548 Burns 1901.

The demurrers to the several answers were properly sustained and the exceptions to the conclusions of law properly overruled.

(4) Numerous reasons for a new trial are assigned relating to the admission and exclusion of evidence, and the insufficiency of the evidence to sustain the finding; the chief insistence, and in fact the only point urged, being the total absence of evidence in support of the finding of an allowance of \$200, on December 6, 1894; and that the total receipts of appellant for his full term were but \$4,502, instead of \$4,702, as found by the court.

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There is no substance in the claim. The particular dates upon which allowances were made are of no consequence. The record shows that appellant in presenting his account for compensation to the board of commissioners on May 8, 1895, admitted that he had received from the county up to that date, \$2,200; and it is admitted that he received at that date \$1,608; and that subsequently he was allowed and paid the further sums, June 3, \$281.25; September 6, 1895, \$586.59; September 8, 1895, \$26.60; making total receipts \$4,702.44. He was entitled under the law to receive \$3,763.19, leaving unaccounted for \$939.25, which is the amount of the judgment. We find no error. Judgment affirmed.

## DUNNINGTON v. SYFERS ET AL.

[No. 19,807. Filed November 26, 1901.]

**TRIAL.—Admission of Evidence.—Objection.—Exception.**—No question is presented on the exclusion of testimony, where the offer to prove was not made until after the objection was sustained and the exception taken. *p. 461.*

**CONTINUANCE.—Absence of Witness.—Affidavit.**—An application for a continuance on account of the absence of a witness is properly denied where it is not made to appear by the facts alleged in the affidavit in support thereof that there was any probability of obtaining the testimony of such witness within a reasonable time. *p. 462.*

**TRIAL.—Directing Verdict.**—Where the evidence introduced by plaintiff wholly fails to establish any cause of action in his favor under the issues, the court may properly direct a verdict for defendant. *p. 462.*

From Hendricks Circuit Court; *J. V. Hadley*, Judge.

Action by M. Helen Dunnington against Rufus K. Syfers and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

*Ira M. Sharp*, for appellant.

*Daniel Wait Howe*, for appellees.

**JORDAN, C. J.**—Appellant originally commenced this action in the Marion Circuit Court against appellees, Rufus

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165	358

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K. Syfers, Frank A. McBride, and George C. Webster, to recover the sum of \$25,000. The venue of the cause was changed to the Hendricks Circuit Court. The following may be said to be an epitome of the facts alleged in the complaint. Appellees herein, together with one Andrew Dunnington, on March 10, 1891, agreed among themselves that they would each contribute \$1,500 for the purpose of purchasing from Leslie E. Keeley, of Dwight, in the state of Illinois, the right to use in the states of Indiana and Kentucky a certain secret process for the treatment of persons addicted to the excessive use of intoxicating liquors and morphine. That after the purchase of said right by the aforesaid parties, they, in the month of March, 1891, began the use of said treatment at the town of Plainfield, Hendricks county, Indiana, the institute established at Plainfield for that purpose being operated by them under the name and style of "The Keeley Institute." Appellant together with her husband, Andrew Dunnington, executed a promissory note for \$1,500, payable to said institute for a one-fourth interest, which her said husband was to have and hold in the concern. Thereafter in August, 1891, said institute was incorporated by appellant and appellees, who became the owners and holders of the entire stock of said corporation, appellant owning thirty shares of the capital stock of the par value of \$50 per share. Upon the organization of said corporation all of the assets belonging to the Keeley Institute, including the right to practice said treatment under the process in question, were turned over to and merged in said corporation. Prior to February 10, 1892, as averred, appellant had no knowledge of the business affairs of said concern, and the same were managed exclusively by appellees, who concealed from her and her said husband, Andrew Dunnington, by whom she was represented, the books and business relating to said institute; that appellees knowing that appellant was ignorant of the value of her stock, and, knowing that its value was far in excess of its



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par value, entered into and formed a conspiracy for the purpose of obtaining her stock for a sum greatly under its value, and for that purpose they represented to her through her said husband that said institute or corporation was losing money, and that the stock thereof had become greatly depreciated in value, and was worthless, and unless she sold the stock held by her within a certain time, they, appellees, would surrender up the right to practice said treatment, and would dissolve the corporation, and thereafter would organize a new one in which she would have no stock or interest. It is further averred that appellant by reason of these representations and statements believed that she was about to lose her stock or interest which she had and held in said corporation or institute, and, being ignorant of the value of her said stock, sold her interest in said corporation to one Rose for the sum of \$5,000, which interest, in fact, was of the value of \$25,000. It is also alleged that appellees thereafter represented to said Rose that he had been swindled in the purchase of appellant's interest, that she had no such interest in the concern as he had purchased, and advised him to "sell out". That thereafter Rose sold the interest which he had purchased from appellant to one Mahorney, who thereafter transferred the same to appellees; that the latter on becoming the sole owners of the stock of the corporation sold and transferred their right to practice said treatment in the State of Indiana for \$50,000, retaining, however, their right to practice the same in the state of Kentucky. The complaint charges that all of the acts, representations, and statements of appellees were false and fraudulent, and made with the purpose and intent to defraud and cheat appellant, and that by reason thereof she has been damaged in the sum of \$25,000, for which judgment is demanded. A demurrer to the complaint having been overruled, appellees answered by denying generally all of the allegations of the complaint, and by setting up affirmative matter as a defense. The issues being joined between the



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parties, a trial before a jury resulted in the court, at the close of appellant's testimony, directing the jury to find for the defendants, with which instruction the jury complied, and over appellant's motion for a new trial judgment was rendered that she take nothing by her action, and that the defendants recover their cost.

The learned counsel for appellees in his argument whereby he seeks to parry the force of the contention of appellant's learned counsel, to the effect that the court erred in directing the verdict, vigorously assails the complaint on the ground that it wholly fails to state any cause of action against his clients, hence, it is insisted that the appellant is not in a position to complain of her failure to recover a judgment, for the reason that there is no foundation whatever upon which a judgment in her favor could rest or be supported. But as the judgment must be affirmed for the insufficiency of the evidence to sustain the complaint, we pass this contention without consideration.

Counsel for appellant contends that the court erred in several instances, as shown by a bill of exceptions, in excluding testimony which appellant offered to prove by certain witnesses. Passing the question raised by appellees as to the relevancy of the evidence in question, we are of the opinion that, under the circumstances, she is not in a position successfully to complain of these rulings of the trial court in excluding such evidence, for the reason, as it appears, that in each instance after the trial court had sustained appellees' objections to the question propounded to the witness by which the evidence in controversy was sought to be elicited, that appellant excepted to the ruling of the court, and thereafter made an offer or statement to the court of what she proposed to prove by the witnesses under the question propounded. Such procedure, under a well affirmed rule of this court, does not raise or present any question for review in respect to the admissibility of the proposed evidence. See, *Gunder v. Tibbits*, 153 Ind. 591, and cases

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cited; *Whitney v. State*, 154 Ind. 573; *Shenkenberger v. State*, 154 Ind. 630; *Siple v. State*, 154 Ind. 647; *Rinkenberger v. Meyer*, 155 Ind. 152; *Wilson v. Carrico*, 155 Ind. 570; *Mark v. North*, 155 Ind. 575; *State, ex rel., v. Cox*, 155 Ind. 593; *Miller v. Coulter*, 156 Ind. 290.

The question in respect to the alleged error of the court in denying appellant's application for a postponement of the trial on account of the absence of James E. Howland, a witness who resided at Streator in the state of Illinois, is next presented for our consideration. We are satisfied that the court committed no error in denying this application. Passing the question as to whether the application and the affidavit filed in support thereof disclosed due diligence on the part of appellant and her attorney in their endeavors to secure the testimony of this witness, it is certainly true that, under the facts alleged in the affidavit in support of the continuance, it was not made to appear that there was any probability of obtaining the testimony of this witness within a reasonable time. This, under the statute, is required to be shown. §413 Burns 1901, §410 Horner 1897.

It is lastly contended that the court erred in directing a verdict on the motion of appellees at the close of appellant's evidence. In this contention we do not concur. An examination of the evidence introduced by appellant upon the trial satisfies us that it wholly fails to establish any cause of action in favor of appellant. There is an entire absence of evidence in respect to some of the material points which entered into the alleged cause of action. The rule to the effect that where there is a "scintilla" of evidence the trial court must permit the case to be submitted to the jury for their determination does not prevail in this State. *Oleson v. Lake Shore, etc., R. Co.*, 143 Ind. 405, 32 L. R. A. 149; *Meyer v. Manhattan Ins. Co.*, 144 Ind. 439, and cases there cited; *Diezi v. Hammond Co.*, 156 Ind. 583.

Finding no available error, the judgment is affirmed. Hadley, J., did not participate in this decision.

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CITY OF INDIANAPOLIS v. TANSEL.

[No. 19,897. Filed November 26, 1901.]

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**PLEADING.—Evidence.**—Proof of either actual or constructive notice is sufficient to support an allegation, in a complaint in an action against a city for personal injuries sustained by reason of a defective culvert, “that the defendant had notice.” pp. 464, 465.

**TRIAL.—Interrogatories.—Verdict.**—The finding in a general verdict in an action against a city for personal injuries sustained on account of a defective culvert that defendant had constructive notice of the defect, is not affected by an answer to an interrogatory that there was no evidence as to actual notice. pp. 464, 465.

**APPEAL AND ERROR.—Evidence.—Bill of Exceptions.**—The evidence is not in the record where the record does not show that the bill of exceptions containing the evidence was ever filed. pp. 465, 466.

**SAME.—Presumptions.—Evidence Not in Record.**—It will be presumed on appeal from a judgment in favor of plaintiff, in the absence of the evidence from the record, that the evidence fully sustained the averments of the complaint. p. 466.

**SAME.—Presumptions.—Evidence Not in Record.**—A cause will not be reversed on an affidavit filed in support of a motion for a new trial in an action for personal injuries that plaintiff was brought in and out of court in an invalid chair, and as soon as the trial was over he was able to walk without support, where the evidence is not in the record, since it must be presumed in favor of the action of the trial court in overruling the motion for a new trial that plaintiff testified that he could walk without support, and that he explained the use of the invalid chair so that the court in refusing to grant a new trial was satisfied that in fact no fraud had been practiced. pp. 466, 467.

**NEW TRIAL.—Admissions Made After Trial.**—Admissions made by a party to an action by act or word after trial may be used to support a charge of misconduct made a ground for a new trial. *Sullivan v. O’Conner*, 77 Ind. 149, and *Crow v. Brunson*, 1 Ind. App. 268, disapproved. pp. 466, 467.

From Boone Circuit Court; *B. S. Higgins*, Judge.

Action by Jasper O. Tansel against the city of Indianapolis for personal injuries. From a judgment for plaintiff, defendant appeals. *Affirmed*.

*J. W. Kern*, *J. E. Bell* and *S. M. Ralston*, for appellant.  
*A. J. Shelby* and *W. J. Beckett*, for appellee.

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BAKER, J.—Appellee recovered judgment for \$7,000 on account of personal injuries. Appellant assigns that the court erred in overruling (1) its motion for judgment on the jury's answers to interrogatories and (2) its motion for a new trial.

The motion for judgment is predicated on this interrogatory and answer: "Did the defendant city, at the time plaintiff received his alleged injury, have actual notice of the broken condition of the culvert where it is alleged plaintiff fell? Answer: No evidence." The general verdict found all the material averments of the complaint to be true. If the complaint counted on no negligence of appellee except the continuance of the culvert in a broken condition after actual notice in time to have remedied the defect before the accident, the motion for judgment should have been sustained. But the complaint charges "that the said board walk over said gutter and the stringers upon which it was laid had become rotten and decayed and had broken down and had fallen into said ditch and was unfit for use and dangerous; and this was its condition for some time prior to the said 21st day of November, 1898; and this defendant had notice that said sidewalk was decayed and unsafe, and also that it was broken down and dangerous, in ample time to have repaired and rebuilt the same by use of ordinary diligence and care before the said 21st day of November, 1898; but that defendant negligently failed to repair and rebuild said board crossing over said ditch after it became decayed and rotten and unsafe, and negligently left said ditch open and uncovered after the same had broken down, with no means of passing over the same at said crossing, and without any lights or signals of danger, for at least three days and nights prior to the happening of the accident, hereinafter mentioned, on the said 21st day of November, 1898; and all of said time the defendant had notice of the dangerous condition of said board crossing over said gutter, but negligently failed to repair or rebuild the same, although said board

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crossing at said point could have been repaired by the defendant by the use of due diligence after it became rotten and decayed and dangerous, long before the same broke down, and after the same broke down, long before the happening of this accident." The averment is simply "that the defendant had notice". Proof of either actual or constructive notice would support this allegation. *City of Ft. Wayne v. Patterson*, 3 Ind. App. 34; *Hunt v. City of Dubuque*, 96 Iowa 314, 65 N. W. 319. If appellee desired a more specific allegation, a motion to require it should have been made. *Peerless Stone Co. v. Wray*, 143 Ind. 574. The finding in the general verdict that appellee had constructive notice is therefore unaffected by the answers to interrogatories. Moreover, the jury merely answered that actual notice of the broken condition of the culvert had not been proved. This leaves, as proved, the charge that the city had actual notice of the rotten and dangerous condition of the culvert in time by the use of ordinary care to have repaired it before it broke down.

Error is claimed in the instructions on the subject of constructive notice. Appellant does not question the correctness of legal propositions stated, but contends that appellee could recover, under his complaint, only on proof of actual notice, and therefore the giving of instructions allowing a recovery on proof of constructive notice was erroneous and harmful. The complaint, as already shown, warranted proof of constructive notice.

Appellant asserts that the evidence of notice is insufficient to sustain the verdict. There is nothing in the record to show that a bill of exceptions containing the evidence was ever filed in this cause. Without being filed, a bill of exceptions can not become a part of the record. *Merrill v. State*, 156 Ind. 99. The clerk certifies that he has attached to the record the official reporter's transcript of the evidence. Appellant evidently followed the requirements of section 6 of the act of 1899 (Acts 1899, p. 384), which was held void

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in *Adams v. State*, 156 Ind. 596, because it attempted to clothe the reporter with judicial powers.

The contentions, also, that the damages are excessive and that it is a physical impossibility for appellee to have been injured in the manner claimed by him, can not be determined without the evidence. It is not claimed that it is impossible that appellee could have been injured in the manner described in the complaint, nor that the damages awarded are more than a just compensation for the grave and permanent injuries pleaded. The presumption is that the evidence fully sustained the averments.

The remaining ground for a new trial is the alleged misconduct of appellee. It was shown by affidavits that appellee was brought in and out of the court room in an invalid's chair, and that as soon as the trial was ended he was able to walk without support. No counter affidavits were filed. Appellee's conduct in the court room, unexplained, was a representation to the court and jury that he was helpless. If he was able to walk, as the uncontradicted affidavits respecting his subsequent actions proved, and if the court and jury were deceived by his conduct at the trial into believing that he was helpless, a new trial should have been granted promptly. Appellee claims that his admissions (by act or word) after the trial can not be used to support a charge of misconduct, and cites *Sullivan v. O'Conner*, 77 Ind. 149, and *Crow v. Brunson*, 1 Ind. App. 268. These cases, in so far as they support appellee's contention, are disapproved. See: *Humphreys v. Klick*, 49 Ind. 189; *Rains v. Ballow*, 54 Ind. 79; *Andrews v. Mitchell*, 92 Ga. 629, 18 S. E. 1017; *Murray v. Weber*, 92 Iowa 757, 60 N. W. 492; *Means v. Yeager*, 96 Iowa 694, 65 N. W. 993; *Klopp v. Jill*, 4 Kan. 482; *Strout v. Stewart*, 63 Me. 227; *Gardner v. Mitchell*, 6 Pick. 114, 17 Am. Dec. 349; *Cole v. Fall Brook Coal Co.*, 40 N. Y. St. 834; *Brooks v. Rochester R. Co.*, 63 N. Y. St. 508; *Corley v. New York, etc., R. Co.*, 12 App. Div. (N. Y.) 409, 42 N. Y. Supp. 941; *Preston v. Otey*, 88 Va.

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491, 14 S. E. 68; *Goldsworthy v. Town of Linden*, 75 Wis. 24, 43 N. W. 656. But were the court and jury deceived? The evidence given at the trial is not in the record. The trial court, however, heard the evidence, and overruled the motion for a new trial. We are bound to presume, in favor of the ruling, that appellee testified on the trial that he could walk without support and that he explained his use of an invalid's chair, so that the court, in refusing to grant a new trial, was satisfied that in fact no fraud had been practiced.

Judgment affirmed.

DEMAREST, TREASURER SCHOOL CITY OF ELKHART,  
v. HOLDEMAN ET AL.

[No. 19,512. Filed November 26, 1901.]

**PLEADING.—Multifariousness.—Parties.—Equity.**—In 1897 the county auditor made a distribution of the common school fund and the county treasurer obtained possession of the orders for the amount apportioned plaintiff school city, marked the orders paid, and canceled them and filed them with the county auditor. The county treasurer claims that he deposited the money in a certain bank which was authorized by the treasurer of the school board to accept and receipt for such funds. The bank accounted for a part thereof, but claimed \$5,900 of the money was not deposited with it, but was used by the treasurer in paying a county loan. Mandamus was brought against the county treasurer's successor to compel him to pay over said balance, but he answered that the canceled orders were on file showing the payment thereof, which the Supreme Court held was a good answer. Plaintiff then demanded that the county auditor sue such treasurer on his bond for said sum, but this the auditor refused to do, and thereafter the county commissioners compromised with the treasurer's bondsmen for other defalcations of such treasurer, not including the claim in suit, and released them from all liability, whereupon the treasurer of the school city brought suit against the county treasurer and his bondsmen and successors in office, the county auditor, the county commissioners and the bank. *Held*, that the complaint under §269 Burns 1901, which is a substantial reenactment of the rules governing pleadings in chancery, was not bad for multifariousness. pp. 468-476.

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**PLEADING.—Multifariousness.—Parties.—Equity.**—Where the subject of the action has become so complicated and entangled that the rights of the parties are involved in doubt, and it is difficult to determine who is liable, and who is not, except upon a full hearing in which all the persons in any way affected or interested are before the court, equity permits the joinder of all those so related to the controversy and who have a common interest in some one or more branches of it. *pp. 468-476.*

From Elkhart Circuit Court; *H. D. Wilson*, Judge.

Action by Melvin U. Demarest, treasurer of school city of Elkhart, against William H. Holdeman and others. From a judgment on demurrer to complaint, plaintiff appeals. *Reversed.*

*J. M. Van Fleet* and *V. W. Van Fleet*, for appellant.

*C. W. Miller*, *J. S. Drake*, *L. W. Vail*, *E. A. Dausman* and *J. H. State*, for appellees.

**DOWLING, J.**—This is an action to recover \$5,900, with interest from June 2, 1897, from the appellees, or from some one or more of them, and to set aside the cancelation of certain warrants for school funds drawn by the auditor of Elkhart county in favor of one Finn, the predecessor of the appellant in the office of the treasurer of the school city of Elkhart. The court sustained the demurrers of the appellees to the complaint, and error is assigned upon these rulings.

The following is a summary of the complaint: The appellant is the treasurer of the school city of Elkhart, Indiana. In May, 1897, the auditor of Elkhart county made and entered of record in his office a correct distribution of moneys then in the treasury of said county to the school city of Elkhart, the amount so distributed being \$15,194.67. Thereupon, the auditor, as it was his duty to do, made three orders on the county treasurer for said moneys, payable to one Edward Finn, who was then the treasurer of said school city, or bearer, amounting in the aggregate to the said sum of \$15,194.67. The Elkhart National Bank was authorized



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by Finn to receive from the county treasurer, and to receipt for, all moneys coming from such treasurer to said school city. On June 2, 1897, Holdeman, by his deputy, obtained the said orders from the auditor, and gave receipts for them signed "Ed. Finn by W. H. Holdeman." Holdeman claims that one Kerstetter, the cashier and general manager of the said Elkhart National Bank, authorized him to get said orders from the auditor, but said claim is denied by Kerstetter and the bank. After Holdeman obtained possession of the orders he paid upon them to the said Elkhart National Bank \$9,294.67, and no more, leaving \$5,900, which is yet unpaid. Holdeman, who was then the treasurer of said county, canceled all of said orders, by writing across the face of each: "Paid, June 3, 1897, W. H. Holdeman, treasurer of Elkhart county", and afterwards wrongfully filed them in the auditor's office among the paid and canceled orders. One Weaver succeeded Holdeman as county treasurer, and one Seiler succeeded Finn as treasurer of the school city; Seiler brought an action of mandamus against Weaver to compel him to pay over said balance of \$5,900; pending said action, the appellee Wood succeeded Weaver as county treasurer, and was substituted as defendant in the said action; he answered that he found said orders canceled and filed away among the canceled and paid orders in the auditor's office; that his predecessors in office claimed that they were paid; that he had no personal knowledge of the matter, and could not safely pay any money upon them until it should first be determined by some competent tribunal that something was unpaid upon them. The Supreme Court decided that this was a good answer in bar of said action, and, as said answer was true in fact, said Seiler dismissed said suit. The appellant succeeded Seiler as treasurer of the school city of Elkhart, and is yet such treasurer. On the — day of June, 1900, he demanded of one Berkey, then and now the auditor of said county, that he, as such auditor, sue said Holdeman on his bond for the said sum of \$5,900,

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which remained unpaid. Holdeman being a defaulter, the board of commissioners of said county on May 18, 1898, ordered that suit be brought against him on all bonds given by him as treasurer, for the recovery of the balance due said county for county purposes. Suit was thereupon brought against Holdeman and his sureties, on his official bonds, for \$25,000 due to said county for taxes and other moneys belonging to the general revenues of said Elkhart county. On November 1, 1898, this claim was compromised by the board of commissioners, Holdeman, and his sureties, in consideration of the payment of \$14,000, which was agreed upon as a full and complete settlement of all demands of the county against Holdeman, and said sum of \$14,000 was then paid into the county treasury by the sureties on Holdeman's bonds, viz., David W. Neidig, Alfred Lowry, Eliza C. Thomas, William D. Platter, Lou W. Vail, Henrietta Kolb, Charles W. Miller, Seth A. Jones, Walter Hazelton, John W. Fieldhouse, and Norman Sage, and the suit was dismissed. The Elkhart National Bank claims that Holdeman used the \$5,900 in controversy in paying a loan for \$10,000 made by him in the spring of 1897 for and on behalf of said county, but the board of commissioners of said county deny that said sum was used for said county. The balance of \$5,900 due on the canceled orders was not included in the estimate of the defalcation of Holdeman, although the board of commissioners and the other county officers at the time knew that the school city was short on said orders to that amount. The appellant is unable to locate the said sum of \$5,900, or to discover what became of it. The Elkhart National Bank was duly authorized to receive the said moneys, and Holdeman claims that he paid them to said bank, which the bank denies. Holdeman either paid this money to the bank, or converted it to his own use, or paid it upon a debt of said county, or paid it over to Weaver, his successor in the office of treasurer. Weaver asserts that he has no information as to what became of said

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money except the statement of Holdeman that he paid it over to the bank; that if it was among the moneys received by him from Holdeman, he turned it over to his successor, Wood, which appellant does not doubt. No book in the treasurer's office of said county shows the payment of said money, and the only evidences of such payment are the orders which were canceled, as aforesaid, and filed in the auditor's office. On January 12, 1897, Holdeman, as principal, with Neidig, Miller, Vail, Platter, Lowry, and Eliza Thomas (since deceased) executed the bond of said Holdeman as treasurer of said county, and such bond was in full force when the said money was received by Holdeman as such treasurer, and is yet in force. All of the defendants are interested in this controversy, and are made parties so that they may be bound by the judgment setting aside the cancelation of said orders as to \$5,900. The relief demanded is that the cancelation of said orders be vacated, that it be adjudged that \$5,900 remains unpaid thereon, and that judgment for said \$5,900 be rendered against the person or party found liable therefor.

The question is whether the complaint states a cause of action against any of the defendants. The situation, as described, is certainly an unusual one. The school city of Elkhart was entitled to \$15,194.67 as its distributive share of the common school fund. This sum was placed in the hands of Holdeman, the county treasurer for Elkhart county, to be paid over to the school city of Elkhart. A portion of it was so paid. The school city alleges that \$5,900 of the amount due to it was never received by said school city. Three warrants drawn by the auditor upon the treasurer were delivered by the auditor to the treasurer upon the receipt of the latter, as the agent of the treasurer of the board of trustees of the school city. These warrants were marked paid by Holdeman, the county treasurer, and were filed in the office of the auditor among the paid and canceled orders. Holdeman declares that he paid the whole \$15,194.67 to

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the Elkhart National Bank for the use and on the account of the school city of Elkhart. It is admitted that the bank was authorized to receive the money. The bank acknowledges that it received \$9,294.67 from Holdeman, but it denies that it received the remainder. It asserts that Holdeman applied the \$5,900 on a debt of the county. This is denied by the board of commissioners of the county. The books and records in the offices of the auditor and treasurer, which should contain full entries concerning this money, and the disposition made of it, show nothing. With the exception of the receipt for the three warrants, executed to the auditor by Holdeman as the agent of Finn, the treasurer of the school city, no receipt or voucher was given by any person for the missing \$5,900. Other facts which have a tendency to complicate the situation still further are stated in the complaint, but the foregoing are sufficient for the purposes of this opinion.

Counsel for appellant contend that at law the remedy of the appellant is neither plain nor adequate; that, under the peculiar circumstances of this case, the appellant does not know whom to sue; that he has the right to make all persons interested in the controversy, or any part of it, defendants; that the complaint is not multifarious; that the court has jurisdiction of the whole subject, with the power to determine it; that one of the necessary steps in the proceeding is the vacation of the cancelation of the county orders, and that in this all of the appellees have an interest.

The position of the appellant is vigorously combated by the appellees, and it is insisted that no cause of action is stated against the appellees or against any one or more of them. On behalf of Holdeman and his sureties, it is urged that the complaint shows that he was released and discharged by the board of commissioners from all liability upon his official bonds. As to the auditor, Berkey, it is asserted that in refusing to institute suit on the official bond of Holdeman he did his duty, and that the fact that the

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canceled orders were on file in his office fully justified such refusal. No case, it is said, is made against Wood, the present treasurer, because there is no averment that the money was left by Holdeman in the treasury, and that it passed to the hands of Holdeman's successors in office. It is not charged that the money was ever paid over to the Elkhart National Bank, and, therefore, that appellee is not liable. The complaint is also attacked upon the more general grounds that it is multifarious, that persons in no way connected with, or responsible for, each others acts, are joined as defendants; that the facts upon which the liability of each is supposed to rest are diverse and unconnected; and that the allegations of the complaint are not positive and certain, but are ambiguous, and made disjunctively.

The action is in the nature of a suit in equity, and the sufficiency of the complaint is to be determined according to the rules of chancery pleading. Section 269 of the code of civil pleading (Burns 1901) provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved. This section is substantially a reënactment of the rules governing pleadings in chancery, and they apply to all suits at law as well as in equity. *Bittinger v. Bell*, 65 Ind. 445.

In chancery, bills of discovery are allowed in cases where the complainant, for want of information, does not know which of several parties to sue, or where the circumstances are such that he is unable to determine which of several parties is liable to him. It has been held sufficient to sustain a bill against the charge of multifariousness, that each defendant has an interest in some one matter common to all the parties. And where the subject of the action has become so complicated and entangled that the rights of the parties are involved in doubt, and it is difficult to determine who is

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liable, and who is not, except upon a full hearing in which all the persons in any way affected or interested are before the court, equity permits the joinder of all those so related to the controversy, and who have a common interest in some one or more branches of it. *Elmendorf v. Taylor*, 10 Wheat. 152; *Hoppock v. New Jersey R., etc., Co.*, 27 N. J. Eq. 286; *Randolph v. Daly*, 16 N. J. Eq. 313; *Buie v. Mechanics, etc., Assn.*, 74 N. C. 117; *Alexander v. Mercer*, 7 Ga. 549; *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; *Board v. Deyoe*, 77 N. Y. 219; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Winter v. Smith*, 45 Ark. 549; *Gaines v. Chew*, 2 How. (U. S.) 619, 11 L. Ed. 402; *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514; *Bank of Kentucky v. Schuylkill Bank*, 1 Parson's Eq. Cas. 180; *Chadbourn v. Coe*, 10 U. S. App. 78, 2 C. C. A. 327, 51 Fed. 479; *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; 15 Ency. Pl. & Pr. 651; *Thatcher v. Humble*, 67 Ind. 444.

It is obvious from the statements of the complaint, all of which, so far as they are well pleaded, are admitted by the demurrer to be true, that the appellant has not a plain and adequate remedy at law. A multiplicity of actions against the appellees separately, tried by different courts, before different juries, might result in the total loss of the fund in controversy.

The question of the validity of the cancelation of the orders issued by the auditor to Finn, as treasurer of the school city, and alleged to have been obtained and marked paid by Holdeman, is one which must necessarily be decided in any action which might be brought by the appellant against any of the appellees. If these warrants were, in fact, paid to the school city of Elkhart, then no right of action exists against any of the appellees. All of the appellees are interested in defeating the vacation of the memorandum of payment, or cancelation of the orders. This, then,

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is one point in which all the appellees seem to have a common interest.

The facts stated concerning Holdeman, and the persons who were the sureties on his official bond; the allegations in regard to appellee Berkey, the auditor of Elkhart county; the averments as to Wood, the treasurer of that county; the averments concerning the board of commissioners, and the statements as to the Elkhart National Bank, are, as we think, sufficient to require from all of these parties an answer or answers. If Holdeman received the money, and failed to pay it to the school city of Elkhart, then, if the facts stated in the complaint are true, he and his sureties may be liable for the amount wrongfully appropriated by him, notwithstanding any compromise made between Holdeman and his sureties and the county. If Holdeman got the money and embezzled it, the appellant had the right to demand that the auditor bring suit upon his bond for the use of the school city. §8650 Burns 1901; *Gauntt v. State, ex rel.*, 81 Ind. 137; *Taggart v. State, ex rel.*, 49 Ind. 42. The statute does not require that the auditor should obtain authority from the board of commissioners to bring the action. §7985 Burns 1901.

If the \$5,900 was in the hands of Holdeman and was applied by him upon a debt of the county of Elkhart; or, if it was left by him in the treasury, and passed in the final settlement to his successor, and from him to the present treasurer, then the county, in the first case, and the present treasurer in the second, may be liable for the amount so used, or paid over. If Holdeman paid the moneys in controversy to the Elkhart National Bank, that appellee is liable to the appellant. The refusal of the auditor to bring the action against Holdeman and his sureties on the official bond of Holdeman probably authorized the appellant to bring this action in his own name at least for the purpose of ascertaining the amount due to him from Holdeman. As the complaint stated a cause of action against each of the several

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appellees, and as they were properly joined as defendants in this suit, the demurrers to the complaint should have been overruled.

For the errors of the court in sustaining the several demurrers of the appellees, the judgment is reversed, with instructions to overrule the demurrers, and for further proceedings in conformity to this opinion.

Baker, J., did not participate.

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 NEU ET AL. v. TOWN OF BOURBON ET AL.

[No. 19,577. Filed November 26, 1901.]

APPEAL AND ERROR.—*Failure of Appellee to File Brief.*—Where the appellee fails to file a brief within the time allowed in support of the judgment, such failure may be accepted and deemed to be a confession of the errors assigned by the appellant, and the Supreme Court, in the exercise of its discretion, may reverse the judgment without considering the appeal on its merits.

From Marshall Circuit Court; A. C. Capron, Judge.

Suit by Charles H. Neu and others to enjoin the town of Bourbon from carrying out a plan to purchase or construct a system of water-works and electric light plant. From a judgment for defendants, plaintiffs appeal. *Reversed.*

C. P. Drummond, for appellants.

JORDAN, C. J.—Appellants as resident taxpayers of the incorporated town of Bourbon sought to enjoin the town, together with its board of trustees, from carrying out a certain scheme or plan whereby it was to construct or purchase a system of water-works and an electric light plant for said town, and thereby incur an indebtedness in excess of two per cent. of its taxables, all, as asserted, in violation of appellants' rights as guaranteed by article 13 of the State Constitution, which prohibits municipal corporations from becoming indebted in excess of two per cent., etc.

The complaint is in four paragraphs, and, in the main, proceeds upon the theory that the proposed scheme which



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defendants had undertaken would result in creating an indebtedness against the town in violation of the prohibition of said article of the Constitution. The fourth paragraph, under the facts therein alleged, is to the effect that the water-works sought to be purchased by appellee were incomplete and defective, and by accepting the same the town would exceed its powers, and would perpetrate a fraud upon its taxpayers. The court, upon the trial, made a special finding of facts and stated conclusions of law thereon. By the first conclusion the court held adversely to appellants on the first three paragraphs of their complaint, and against appellees on the fourth paragraph. The only error presented and relied upon for reversal is based on the first conclusion of law.

Appellants have filed a voluminous brief wherein they argue and contend that, under the facts as disclosed by the special finding, the scheme entered into by the board of trustees of said town and the Bourbon Water and Light Company is in contravention of said article 13 of the Constitution and thereby their rights guaranteed thereunder are impaired.

This cause was submitted on March 15, 1901, and on May 14th following appellants filed their brief. Appellees, under the rules of this court, were allowed ninety days after the submission of this appeal to file a brief, but none appears to have been filed by them during that period, and no request thereafter was made by them to file a brief, and the fact is that no argument whatever, by a brief or otherwise, has been presented by appellees to sustain the judgment rendered in their favor by the trial court. In this respect they are wholly in default, and, under the circumstances, we are left unaided by them in considering and determining the constitutional question herein involved and elaborately discussed by appellants' counsel. This neglect on the part of the appellees is inexcusable, and is violative of the rule declared by this court in *Berkshire v. Caley*, ante,

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1, which decision was announced quite a while before the limit for the filing of a brief by appellees had expired. In that appeal, in referring to the neglect of the appellee therein to file a brief, we said: "This neglect is to be regretted, and meets our positive disapproval. Where a successful party in the lower court, when the case has been appealed by his adversary to this court, becomes so indifferent or derelict as to fail to prepare and file within the time allowed a brief or argument in support of the judgment assailed, such failure or default upon his part may be accepted and deemed to be a confession of the errors assigned by appellant, and this court, in the exercise of its discretion, may reverse the judgment without considering the appeal on its merits. We do not in this appeal enforce the rule here declared, but parties should be admonished in respect to its enforcement in the future and govern themselves accordingly."

Consequently all party appellees who are interested in appeals pending in this court must remember that this rule will be enforced, unless this court, upon a proper showing, is satisfied that the neglect in question is excusable. It follows, therefore, from the enforcement of the rule announced in that appeal that appellees' default herein must be accepted and deemed to be a confession upon their part of the error assigned in this cause, and the judgment below, so far as it is adverse to appellants, is accordingly reversed, at the cost of the appellees, but without prejudice to either party. The cause is ordered to be remanded to the lower court for further proceedings.

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FIRST NATIONAL BANK OF SEYMOUR v. GREGER,  
TREASURER JACKSON COUNTY.

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161 281

[No. 19,628. Filed November 26, 1901.]

**PLEADING. — Exhibits. — Injunction. — Taxation.** — Where the complaint, in a suit to enjoin the collection of taxes on the ground that the assessment had been reduced on appeal to the State Board of Tax Commissioners, alleged that the minutes of said board were indefinite and uncertain, and were afterward corrected, a copy of the corrected minutes filed as an exhibit cannot be considered in determining the sufficiency of the complaint, since the action was not founded upon the minutes. *pp. 479-481.*

**INJUNCTION. — Taxation. — Complaint.** — A complaint by a bank to enjoin the collection of taxes, alleging that the valuation of its capital stock and property as entered on the tax duplicate was \$143,110, but that on appeal the State Board of Tax Commissioners assessed the same at \$133,110, and that plaintiff paid the taxes on the latter valuation, is sufficient on demurrer. *pp. 479-481.*

From Jackson Circuit Court; *T. B. Buskirk*, Judge.

Suit by the First National Bank of Seymour against Alexander Greger, treasurer of Jackson county to enjoin the collection of taxes. From a judgment for defendant on demurrer to complaint, plaintiff appeals. *Reversed.*

*O. H. Montgomery*, for appellant.

*C. E. Wood*, for appellee.

**MONKS, J.** — It appears from the record that the valuation of appellant's capital stock and property was entered on the tax duplicate of Jackson county for 1899 at \$143,110, the amount to which the same was increased by the county board of review and the taxes extended thereon at the rate of \$1.68 on each \$100 of said valuation; that appellant paid its taxes at that rate on \$133,110, and brought this action to enjoin the remainder of the taxes charged on said duplicate, claiming that the State Board of Tax Commissioners had on appeal assessed said capital stock and property at \$133,110 for the year 1899. A demurrer for want of facts

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was sustained to the complaint, and this ruling is assigned for error.

If it is shown by the complaint that the State Board of Tax Commissioners assessed said property on appeal at \$133,110 the court erred in sustaining the demurrer, and the judgment must be reversed, otherwise it must be affirmed. The part of the complaint essential to the determination of this question is as follows: "On the 19th day of August said State Board of Tax Commissioners, having duly obtained jurisdiction of said matter, duly granted plaintiffs said appeal, and finally assessed plaintiff, its capital stock and property for the year 1899 at the aggregate sum of \$133,110, but that the minutes of the action of said board were indefinite and uncertain, and the same were, on the 2nd day of January, 1901, by said board made more certain and definite, a copy of which corrected minutes is filed herewith and made a part hereof marked exhibit A." As the action was not founded upon the minutes made at the special session of the board in January, 1901, the same can not be considered in determining the sufficiency of the complaint, although filed as an exhibit. *Gum-Elastic, etc., Co. v. Mexico Pub. Co.*, 140 Ind. 158, and cases cited, 30 L. R. A. 700.

There is a direct averment that on appeal the State Board of Tax Commissioners assessed appellant's capital stock and other property at \$133,110, and there are no facts averred in the complaint which contradict or overthrow said allegation. No question concerning the sufficiency of the record of the action of the board, at its regular session, to establish the allegations in the complaint, or the admissibility thereof in evidence, is presented by the demurrer to the complaint. Neither is any question presented as to the power of said board to make the *nunc pro tunc* entry at its special session in January, 1901.

A constitutional question is discussed in the briefs, but it is well settled that the same will not be considered when

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State, *ex rel.*, v. Phillips.

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the case can be decided without passing upon that question. *Martin v. State*, 143 Ind. 545, 549; *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687, 694. It follows that the court erred in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

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THE STATE, EX REL. LYONS v. PHILLIPS, RECORDER  
VIGO COUNTY.

[No. 19,748. Filed November 26, 1901.]

**FEES AND SALARIES.—Act of 1895.—Recorder's Fees.—Notice of Mechanic's Lien.—Repeal of Statute by Implication.**—Section 7258 Burns 1901, to the extent of fixing the fee of twenty-five cents for recording notice of mechanic's lien is by implication repealed by §117 of the fee and salary act of 1895 (Acts 1895, p. 349), providing that the county recorder shall receive certain fees for recording certain designated instruments, and "for entering on entry book, indexing and recording all other instruments, ten cents per hundred words, but no charge to be less than fifty cents."

From Vigo Superior Court; *S. C. Stimson*, Judge.

Mandamus by State, on relation of Winfield S. Phillips, recorder of Vigo county, to compel the latter to record notice of mechanic's lien for twenty-five cents. From a judgment for defendant, relator appeals. *Affirmed.*

*Frank Carmack*, for appellant.

*G. M. Crane, D. V. Miller* and *A. L. Miller*, for appellee.

JORDAN, C. J.—The State on the relation of Winfield S. Lyons filed a verified petition in the lower court for a mandamus to compel the appellee, as recorder of Vigo county, to receive from relator and record for him in the recorder's office of that county a certain written notice to John A. McDaniel and others, wherein the relator declared his intention to hold a mechanic's lien upon certain property therein described. The petition, among other things, alleged "that

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on the 21st day of August, 1901, the relator presented said notice to Phillips as such recorder at the recorder's office, in the city of Terre Haute, in Vigo county and State of Indiana, during office hours, and then and there tendered to said Phillips as such recorder twenty-five cents of the lawful money of the United States as a fee for filing and recording said notice, and at the time requested said Phillips as such recorder to file said notice and to record it in the proper records of said office. That said Phillips as such recorder then and there refused to file and record said notice as required by law, and refused to receive said twenty-five cents as a fee for filing and recording said notice, and still refuses to receive and file and record said notice, or to receive said fee, but demands of relator the sum of fifty cents for filing and recording the same." A demurrer for insufficiency of facts was sustained to the petition, and judgment was rendered against relator for costs.

The sole question presented for determination in this appeal is, was appellee, as recorder of said county, authorized by law to demand or exact of the relator the sum of fifty cents as a fee for recording the notice in question? The solution of this question depends upon the construction of §117 of the fee and salary statute approved March 11, 1895, Acts 1895, p. 319, §6523 Burns 1901, §7451 Horner 1897, which reads as follows: "The recorders of the various counties in this State shall, on behalf of their respective counties, tax and collect, upon proper books to be kept in their offices for that purpose, the fees and amounts provided for by law on account of services rendered by said recorders. \* \* \* The fees so taxed and collected shall be as follows: For entering in the entry book and recording deeds and mortgages, and the acknowledgments thereto, and indexing the same, if such deed or mortgage do not contain more than 600 words, \$1. And if such instrument contains more than 600 words, for each additional 100 words, (four figures counting as one word) ten cents. \* \* \*

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For entering on entry book, indexing and recording all other instruments, ten cents per hundred words, but no charge to be less than fifty cents." Section 4 of the mechanic's lien law of 1883, being §7258 Burns 1901, §5296 Horner 1897, is in part as follows: "The recorder shall record the notice, when presented, in the miscellaneous record book, for which he shall receive twenty-five cents."

The theory of appellant's complaint as well as the contention of his counsel is that the provision of the above section which fixes the charge for recording the notice of the mechanic's lien is not repealed by the later provision of §117, *supra*, which as previously shown, provides: "For entering on entry book, indexing and recording *all other instruments, ten cents per hundred words, but no charge to be less than fifty cents.*" (Our italics.)

The legislature after fixing by §117 of the fee and salary act what the recorder shall charge for recording deeds and mortgages and other documents specially mentioned declares in language of no uncertain meaning that the charge for recording "all other instruments" shall be measured at ten cents per hundred words, but that the minimum fee for recording any instrument meant and included within the phrase "all other instruments" shall not be less than fifty cents. Or, in other words, for recording any instrument embraced within the meaning of said phrase "all other instruments", which contained any number of words less than 500, the fee to be exacted by the recorder shall be fifty cents. This clause or phrase of the section in question is broad and comprehensive, and was intended by the legislature to embrace all instruments entitled to be recorded which were not otherwise specifically mentioned in the section. Appellant insists that §118 of the fee and salary act of 1895 has the effect to except notices of mechanic's lien from the operation of the provision in §117, for the reason that such notices are not specifically mentioned therein. If the expressed requirement of said section, that the charge shall not

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be less than fifty cents, does not apply to a mechanic's lien notice, because the same is not specifically named, then the provision can have no application to any instrument, as none is specifically mentioned in the particular provision in question. Such a construction would render this provision of the statute meaningless. That a mechanic's lien notice, which is required to be recorded by the statute creating such lien, must be deemed to be an instrument, and one which is included in the phrase "all other instruments" can not, in our opinion, be successfully controverted. The word "instrument", in a legal sense, is defined to be: "A writing, as the means of giving formal expression to some act; a writing expressive of some act, contract, process or proceeding, as a deed, contract, writ," etc. Webster's Int. Dict. "A writing given as the means of creating, securing, modifying, or terminating a right, or affording evidence, as a writing containing the terms of a contract, a deed of conveyance, a grant, a patent, an indenture," etc. Century Dict. "A formal legal writing, e. g., a record, charter, deed or written agreement." Rapalje's Law Dict. "Anything reduced to writing: A 'written instrument', or 'instrument of writing'; more particularly, a document of formal or solemn character." Anderson's Law Dict. "The term 'instrument', in its broadest sense, comprises formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages," etc. 16 Am. & Eng. Ency. of Law (2nd ed.), p. 824. Abbott in his law dictionary defines the term instrument as "something reduced to writing as a means of evidence." The word instrument is frequently employed in our registry laws, and usually refers to some written document that is entitled to be recorded in a public record. By §8006 Burns 1901, the recorder is required to record all deeds, bonds, etc., and "other instruments of writing delivered to him, which by law he is bound to record."

It has been held by this Court and the Appellate Court that a notice of a mechanic's lien is a written instrument



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within the meaning of §365 Burns 1901, §362 Horner 1897, which provides: "When any pleading is founded on a written instrument \* \* \* the original, or a copy thereof, must be filed with the pleading." *Wasson v. Beauchamp*, 11 Ind. 18; *Scott v. Goldinghorst*, 123 Ind. 268; *McCarty v. Burnet*, 84 Ind. 23; *Davis v. McMillan*, 13 Ind. App. 424.

The fee and salary law of 1895 declares that "all laws and parts of laws in conflict with this act are hereby repealed to the extent of such conflict." Section 4 of the mechanic's lien law, §7258 Burns 1901, to the extent of fixing the fee at twenty-five cents, to be paid for recording a mechanic's lien notice, is in direct conflict with the provision of §117 of the fee and salary act, which, as we hold, fixes the fee to be charged by the recorder for recording such notices at not less than fifty cents, and is therefore repealed by the later statute. As the petition discloses that the relator only tendered to appellee, as the recorder, the sum of twenty-five cents for the services which he demanded, it follows, on the conclusion which we have reached, that the appellee rightfully refused to receive and record such notice, and the petition, for this reason, was not sufficient to entitle appellant to a mandamus. It is possibly true, as counsel for appellant contend, that the fee exacted by the law of 1895 for recording a short notice of a mechanic's lien is excessive, but that is a question for the consideration of the legislature. Courts must enforce the laws as enacted.

Judgment affirmed.

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HUBBARD v. GOSS, TREASURER MORGAN COUNTY.

[No. 19,646. Filed November 26, 1901.]

**TAXATION.—Equalization.—Notice to Property Owner.**—That part of §8532 Burns 1901 which provides for notice to each person the valuation of whose property the county board of review deems it necessary to increase is applicable only when the board is acting in case

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of individual citizens, and not to cases when the board makes orders for the purpose of equalization in certain divisions of a township under §8533 Burns 1901. pp. 486, 487.

**TAXATION.**—*Increase of Valuation by Board of Review.*—*Notice.*—That the valuation of each taxpayer's property within a township or division of a township may be increased by the county board of review, under §8533 Burns 1901, without notice other than that given by the law itself (§6367 Burns 1901), does not render the statute invalid as taking property without due process of law. pp. 488-491.

From Morgan Circuit Court; *M. H. Parks*, Judge.

Injunction by Sanders Hubbard against E. L. Goss, treasurer of Morgan county, and others to restrain the collection of certain taxes. From a decree for defendant, plaintiff appeals. *Affirmed.*

*O. Matthews*, for appellant.

*W. R. Harrison* and *W. L. Taylor*, for appellees.

**MONKS, J.**—It appears from the record that the board of review of Morgan county at its annual meeting in 1899 increased the valuation of the real estate in certain divisions of Monroe township in said county twenty-five per cent. over the amount fixed by the assessor of said township. The lands in the divisions of said township, the valuation of which was so increased, were owned by more than 250 persons, one of whom was appellant. The auditor of the county gave the notice of said annual meeting as required by law. The law also fixes the time and place of the meeting of said board. Appellant after paying the taxes on his real estate in said township at the valuation thereof fixed by the township assessor brought this action to enjoin appellee, treasurer of said county, from collecting the remainder, being on the amount added by the board of review. Final judgment was rendered in favor of appellee.

Appellant insists that as said valuation was raised without giving any notice to him as required by §114 of the tax law of 1891 as amended in 1895 (Acts 1895, pp. 75, 78, being §8532 Burns 1901, §6381 Horner 1897), the board of review had no jurisdiction over his person, and its said

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action was therefore void. Said §114, *supra*, among other things, provides for notice to each person the valuation of whose property said board deems it necessary to increase. This provision concerning notice was enacted in conformity with the rule declared by this court in *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, and applies only when the board is acting in cases of individual citizens under said §114, and not to cases when the board makes orders for the purpose of equalization under §115 of the tax law of 1891 as amended in 1895 (Acts 1895, pp. 78, 79, being §8533 Burns 1901, §6382 Horner 1897).

As the board of review for the purpose of equalization raised the valuation of said divisions of said township, such action is clearly governed as to notice and the power of the board by the provision of §115, *supra*, and not by §114, *supra*. No notice is provided for in said section. The only notice, therefore, given the taxpayer concerning proceedings under said §115 is that given by the law itself, which fixes the time and place of meeting, of which the taxpayers must take notice, and the general notice of the time and place of such meeting which the law requires the county auditor to give, and the notice which §8521 provides the township assessor shall give each landholder of the valuation of his lands and the time and place when the board of review "will meet for the purpose of hearing grievances, and to equalize taxes within the county." No other notice was necessary to give the board full and complete jurisdiction to make the orders complained of under said §115. 25 Am. & Eng. Ency of Law 253, 254; Cooley on Tax. p. 226; 1 Desty on Tax. pp. 599-603. The board of review, under §115, *supra*, operates upon classes of property and upon townships and divisions thereof for the purposes of equalization, and such orders affect the taxpayers generally, while under §114, separate action is taken against each individual citizen by the board, and for such proceedings special notice is provided for. This distinction is recognized and pointed out in *Kuntz v. Sumption*, 117 Ind. 1, 2.

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The fact that the valuation of each taxpayer's property within the township or division thereof may be increased by the order or orders of the board under said §115 does not render the same obnoxious to any provision of the State or federal Constitution.

The powers in regard to equalizing the valuation of property as listed and assessed in the different counties, given the State Board of Tax Commissioners by §§8553, 8554 Burns 1901, are similar to those given the county board of review by §115, *supra*, yet no one would claim that said §§8553, 8554 Burns 1901, were unconstitutional so far as they attempt to confer upon the State Board of Tax Commissioners power to increase the valuation in the different counties without any notice except that given by the law itself in fixing the time and place of the meeting of said board.

Speaking on this subject the Supreme Court of the United States said in *Taylor v. Secor*, 92 U. S. 575, on p. 609, 23 L. Ed. 672: "It is charged that the board of equalization increased the estimates of value so reported to the auditor, without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us, that for want of this notice the whole assessment of the property and levy of taxes is void. It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the State, when the value assessed upon it by the local assessor has been increased by the board of equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole State. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual

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who owns any in that county. Must each of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

In *Cincinnati, etc., R. Co. v. Commonwealth*, 115 U. S. 321, on p. 331, 6 Sup. Ct. 60, 29 L. Ed. 417, the same court say: "In support of the first of these propositions, it is contended on behalf of the plaintiffs in error, that, by the enforcement of these judgments, they will be deprived of their property without due process of law, because the valuation of their property under the act is made by the board of railroad commissioners without the right on their part to notice of the proceeding, or the right to be heard in opposition to any proposed action of the board in its progress. It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that 'due process of law', as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient."

In *County of San Mateo v. Southern Pac. R. Co.*, 13 Fed. 722, on p. 752, Mr. Justice Field says of the same question: "Due process of law in the proceeding is deemed to be pur-

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sued, when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient, if the time and place of hearing be designated by statute."

In the case of *Sanford v. Poe*, 69 Fed. 546, on p. 552, 37 U. S. App. 378, 16 C. C. A. 305, the circuit court of appeals say: "There is no ground for complaint that the assessments were made without due process of law. The complainants had notice of the time and place where the board would meet, and were required to make a sworn return of their property. The time and place were fixed by the law, and its sessions were not secret. In *State v. Jones*, 51 Ohio St. 492, heretofore cited, the supreme court of Ohio construed the act as entitling the companies 'to be present and explain the statement rendered of its property and the value thereof.' They did, in fact, appear, and offered evidence, and were heard by counsel." See, also, *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 425, 427, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Winona, etc., Co. v. State*, 159 U. S. 526, 537, 538, 16 Sup. Ct. 83, 40 L. Ed. 247; *Weyerhaeuser v. State*, 176 U. S. 550, 554-557, 20 Sup. Ct. 485, 44 L. Ed. 583; *State, ex rel., v. Armstrong*, 19 Utah 117, 123-128, 56 Pac. 1076; *Suydam v. County of Merrick*, 19 Neb. 155, 158-160, 27 N. W. 142; *State, ex rel., v. Edwards*, 26 Neb. 701, 704-706, 42 N. W. 882; *State, ex rel., v. Edwards*, 31 Neb. 369-372-374, 47 N. W. 1048; *Streight v. Durham*, 10 Okla. 361, 61 Pac. 1096; *Scammon v. City of Chicago*, 44 Ill. 269, 276; *Fields v. Russell*, 38 Kan. 720, 17 Pac. 476; *Challiss v. Rigg*, 49 Kan. 119, 127, 128, 30 Pac. 190; *Cincinnati, etc., R. Co. v. Commonwealth*, 81 Ky. 492, 507; *Spalding v. Hill*, 86 Ky. 656, 662, 7 S. W. 27; *State, ex rel., v. Springer*, 134 Mo. 212,

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226, 35 S. W. 589; *Baird v. Williams*, 49 Ark. 518, 530, 6 S. W. 1; *State v. Runyon*, 41 N. J. L. 98, 103; *Powers v. Larabee*, 2 N. Dak. 141, 153, 49 N. W. 724; *Hambleton v. Dempsey*, 20 Ohio 168, 173; *Desty on Taxation*, 599, 600; *Cooley on Taxation*, 226; 25 Am. & Eng. Ency. of Law 255.

It is clear that the doctrine in regard to notice declared in *Kuntz v. Sumption*, 117 Ind. 1, applies only to the action of the board of review concerning the property of the individual taxpayer under §114, *supra*, and does not apply to proceedings under §115, *supra*, for the purpose of equalization.

Judgment affirmed.

Jordan, J., took no part in the decision of this cause.

SMITH ET AL. v. FAIRFIELD ET AL.

[No. 19,394. Filed October 11, 1901. Petition to reinstate denied November 26, 1901.]

**APPEAL AND ERROR.—Vacation Appeal.—Parties.**—In order to give the Supreme Court jurisdiction of an appeal taken in vacation, the assignment of errors must contain the full names of all parties affected by the judgment. *p. 493.*

**SAME.—Vacation Appeal.—Parties.**—Inserting in the caption of an assignment of errors in a vacation appeal, as appellees, the names of judgment defendants jointly bound with the appellants is unwarranted by the statute relating to appeals, and is of no effect. *p. 493.*

**SAME.—Vacation Appeal.—Parties.**—When part only of judgment defendants take a vacation appeal, under §647 Burns 1901, all of the persons jointly bound must be named in the assignment of errors as appellants. *p. 493.*

From Allen Circuit Court; *Edward O'Rourke*, Judge.

From a judgment in favor of Willard A. Fairfield and others establishing a drain, the remonstrators, Annie A. Smith and others, appeal. *Appeal dismissed.*

*S. R. Alden*, for appellants.

*T. E. Ellison*, for appellees.

157	491
158	225
158	226
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159	421
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162	139
162	666
157	491
168	656

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HADLEY, J.—This is a vacation appeal from a proceeding under the drainage law of 1881 for the construction of a ditch. Appellees present fourteen reasons, for each of which, they insist, this appeal should be dismissed. One of these reasons is defect of parties appellant. The record is anomalous, but when fully understood exhibits the facts following: On April 9, 1897, before the county commissioners, upon the filing of the viewers' report, seventeen persons filed a joint and several remonstrance. The remonstrance having been decided against them, fourteen of the remonstrators executed a bond and appealed to the Allen Circuit Court. In the circuit court, on November 29, 1897, four of said remonstrators, namely, Dallas and Mary Branstrator, and Newton and Catherine Kimmel, "filed their written withdrawal and consent that said ditch may be established as found by the board of commissioners." On February 8, 1899, the four persons so withdrawing, without it appearing how they were relieved of their previous formal withdrawal and assent to the proceeding, and eleven others, refiled in the circuit court the remonstrance filed by them before the commissioners April 9, 1897. The issues presented by the remonstrance were tried and determined in the circuit court adversely to the remonstrators, and a general judgment rendered establishing the ditch, and "that the petitioners recover of the remonstrators their costs", etc., whereupon said four persons and eleven others of the remonstrators filed their joint and several motion and reasons for a new trial, which motion was overruled, and the same four persons and ten other co-remonstrants prayed an appeal to this court. In the assignment of error here the names of these four persons appear in the caption in a long list of appellees, but they do not appear as appellants in the caption, or anywhere in the body of the assignment. From the files it is shown that the four had notice, and the Kimmels appeared and filed their declination to join in the appeal. But nothing is shown with respect to the action of the Branstrators.



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To give this court jurisdiction of an appeal taken in vacation the assignment of error must contain the full names of all parties affected by the judgment, since we have no power to disturb a joint judgment without disturbing it as to all, and have no jurisdiction to disturb it as to those who are not parties to the appeal. *Gourley v. Embree*, 137 Ind. 82; *Big Four, etc., Assn. v. Olcott*, 146 Ind. 176; *McClure v. Shelburn Coal Co.*, 147 Ind. 119; *Barnett v. Bromley Mfg. Co.*, 149 Ind. 606; Ewbank's Manual, §126.

Inserting in the caption of an assignment of error, as appellees, the names of judgment defendants jointly bound with the appellants, amounts to nothing. It is assigning them an attitude wholly inconsistent with their relation to the case, and is unwarranted by the statute relating to appeals. It has been often and uniformly held by this court that when part only of joint judgment defendants take a vacation appeal under §647 Burns 1901, §635 R. S. 1881 and Horner 1897, all the persons jointly bound must be named in the assignment of error as appellants. *Gregory v. Smith*, 139 Ind. 48; *Benbow v. Garrard*, 139 Ind. 571; *Inman v. Vogel*, 141 Ind. 138; *Ledbetter v. Winchel*, 142 Ind. 109; *Vordermark v. Wilkinson*, 142 Ind. 142, 146; *Denke-Walter v. Loeper*, 142 Ind. 657; *Midland R. Co. v. St. Clair*, 144 Ind. 363; *Roach v. Baker*, 145 Ind. 330; *Lowe v. Turpie*, 147 Ind. 652, 37 L. R. A. 233; *McKee v. Root*, 153 Ind. 314.

What the effect may be of the appearance of the Kimmels and their refusal to join in the appeal, we do not decide, since the absence of the Branstrators, in any event, will defeat the appeal. Appeal dismissed.

157	494
159	86

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168	259
168	364
168	365
168	571
168	621

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168	282
168	449
168	462
168	464
168	465
168	481
168	484

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169	10

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171	493
171	616

**INDIANAPOLIS UNION RAILWAY COMPANY v. HOULIHAN.**

[No. 18,995. Filed June 6, 1901. Petition for rehearing withdrawn December 6, 1901.]

**APPEAL AND ERROR.—Record.—Amended Complaint.—Presumption.**

—Where the clerk certifies that the pleading copied into the record as the amended complaint, is the amended complaint, it will not be held to be the original complaint which is found to be the same, word for word, since it was the clerk's duty to embody the amended complaint in the transcript, and to omit the original, and the presumption is that the clerk properly performed his official duty. *pp. 497, 498.*

**MASTER AND SERVANT.—Railroads.—Employers' Liability Act.—Personal Injuries.—Complaint.**—In an action by a railroad employe for an injury caused by the alleged negligence of defendant's locomotive engineer, it is not necessary to allege in the complaint, under the first part of the fourth subdivision of the first section of the employers' liability act (§§7083-7087 Burns, 1901), that plaintiff was "obeying or conforming to the order of some superior at the time of such injury, having authority to direct." *pp. 498-500.*

**SAME.—Employers' Liability Act.—Railroads.—Personal Injuries.—Constitutional Law.**—The provision of fourth subdivision of the first section of the employers' liability act (§§7083-7087 Burns 1901), which holds railroad companies liable to their employes, the same as to strangers, for the negligence of their servants in charge of signals and so forth, is not in conflict with the equality clauses of the federal and State Constitutions. *pp. 500-502.*

**RAILROADS.—Personal Injuries.—Negligence.—Complaint.—Master and Servant.**—A complaint in an action against a railroad company for personal injuries alleged that plaintiff was employed by defendant as a telegraph operator at a railroad crossing, and that it was his duty to keep an account and take a report of all the cars that passed in and out at the crossing over defendant's line and set the targets; that it was plaintiff's duty to go from the telegraph office, which was located about three feet from the west track, over the west track to receive reports from the outgoing trains on the east track; that while in the performance of his duty he was struck by an engine on the west track which gave no warning of its approach, and which he could not see or hear because of obstruction and noise, and that the engineer in charge of the approaching engine knew of his duty to cross the track at that time. *Held*, that although the statutory requirements as to approaching crossings did not apply, it was the duty of the engineer to exercise that dili-

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gence for plaintiff's safety, which a man of ordinary prudence would have exercised, under like circumstances, and that the complaint charged actionable negligence. *pp. 502, 503.*

**PLEADING.** — *Railroads.* — *Negligence.* — A complaint in an action against a railroad company for personal injuries, charging that the injuries were inflicted by reason of "all of defendant's negligence as herein alleged," includes the negligence of the engineer charged therein. *pp. 503, 504.*

**TRIAL.** — *Verdict.* — *Interrogatories.* — *Railroads.* — A telegraph operator at a railroad crossing was required to set targets and receive reports of passing trains, and while in the performance of his duties he was struck by an engine approaching from the north, and injured. The jury returned a verdict for plaintiff, and in answer to an interrogatory, found that a person standing against the east side of the target pole could see an engine coming from the north, when it got within about twenty feet. *Held*, that such answer did not overbear the general verdict where it was not found that plaintiff occupied the position named when the engine was more than twenty feet away. *pp. 504, 505.*

**EVIDENCE.** — *Contracts.* — *Release.* — *Consideration.* — *Master and Servant.* — In an action against a railroad company for personal injuries, defendant pleaded and introduced in evidence a contract releasing defendant from liability in consideration of defendant's agreement to pay certain expenses of plaintiff, and of a sum of money recited as having been paid. *Held*, that the consideration stated is contractual, and that under a reply of no consideration parol evidence is not admissible to contradict or vary the consideration expressed. *pp. 505-508.*

From Boone Circuit Court; *B. S. Higgins*, Judge.

Action by John J. Houlihan against the Indianapolis Union Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. *Reversed.*

*A. Baker, E. Daniels, S. M. Ralston and C. M. Zion*, for appellant.

*A. J. Terhune, A. J. Shelby, W. J. Beckett and A. C. Harris*, for appellee.

**BAKER, J.** — Judgment for appellee for \$15,000 on account of personal injuries. Appellant assigns that the court erred in overruling (1) its demurrer to the amended complaint; (2) its motion for judgment on the jury's answers to interrogatories notwithstanding the general verdict, and (3) its motion for a new trial.

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(1) The amended complaint alleges that appellant operates a railway in and about Indianapolis, known as the Belt line; that outside of the city, near the stock-yards, the Belt line crosses the Vandalia railroad at right angles; that the Belt line runs north and south, and the stock-yards are south of the crossing; that each line has two tracks at the crossing, which are parallel and about six feet apart; that on August 8, 1895, appellee was employed by appellant as a telegraph operator at the crossing and it was his duty to keep an account and take a report of all the cars of other railways that passed in and out at the crossing over appellant's line, and report the same to appellant, and set the targets at the crossing, and appellee had no other duties; that trains coming south into the stock-yards ran on the west track of appellant's line and trains passing north out of the stock-yards ran on the east track; that it was appellee's duty to go from the telegraph office, which was located in the northwest angle of the crossing and about three feet from the west track, over the west track to receive reports from the outgoing trains on the east track; that some one in charge of the outgoing train would hand to appellee a report of such train while it was in motion passing north over the crossing; that there was no other way by which appellee could receive such reports and this fact was well known to appellant and its engineer in charge of the locomotive engine hereinafter mentioned; that on August 8, 1895, appellee was in the discharge of his duties at the crossing; that without any negligence on his part he stepped out of the telegraph office and was in the act of stepping onto and across the west track in order to receive a report from an outbound train which was then passing north on the east track, as was his duty to do; that appellee did not know of the approach of any engine on the west track; that he could not see the engine as it approached the crossing by reason of posts and high weeds between the telegraph office and the west track, which appellant had negligently permitted to be and grow upon its

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right of way, completely obstructing appellee's view to the north; that he could not hear the engine approaching the crossing by reason of the noise of the outbound train; that appellee was in the act of stepping on the west edge of the west track, without any negligence on his part, when an engine, owned by appellant and in charge of appellant's engineer, was negligently run by the engineer against appellee, without fault on his part, inflicting permanent injuries; that the engineer negligently failed to stop the engine while approaching the crossing from the north, and negligently failed to give any signal of the engine's approach, although he knew that there was an outbound train running north on the east track over the crossing and that appellee would be compelled to cross the west track in discharge of his duty to get the report, but negligently ran the engine at the high and dangerous speed of twenty miles an hour towards and over the crossing, negligently striking appellee as aforesaid and inflicting the injuries as aforesaid, all without fault or negligence of appellee, but by reason of all of appellant's negligence as herein alleged, from which injuries, etc. Wherefore, etc.

Appellee insists that the ruling on the demurrer to this amended complaint can not be considered because the transcript contains a copy of the original complaint, which is found to be word for word the same as the amended complaint. The argument from this state of the record is that the clerk has erroneously copied the original complaint into the transcript where the amended complaint should have been inserted. But the clerk certifies that the paper copied into the record as the amended complaint is the amended complaint. The presumption is that the clerk has properly performed his official duty. It was his duty to embody the amended complaint in the transcript and to omit the original complaint. §662 Burns 1901, §650 R. S. 1881 and Horner 1897. Matter that should have been omitted will not be held to discredit the clerk's certificate of the correctness of mat-

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ter which it was his duty to include. The case of *Ellis v. City of Indianapolis*, 148 Ind. 70, is not in point.

Appellant contends that the amended complaint is bad at common law because the facts show that appellee assumed the risks arising from the obstructions to his view and from the negligence of the engineer who was a fellow servant. Since appellee does not attempt to controvert this contention, it will be passed without consideration, and the sufficiency of the complaint will be determined alone from the employers' liability act. Acts 1893 p. 294; §§7083-7087 Burns 1901, §§5206s-5206v Horner 1897.

The first section of the act provides: "That every railroad \* \* \* corporation \* \* \* shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases: \* \* \* Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury having authority to direct."

The amended complaint does not aver that appellee was "obeying or conforming to the order of some superior at the time of such injury having authority to direct", and appellant claims that this omission leaves the pleading fatally deficient. The fourth subdivision of the first section of the act is divisible into two parts: A railroad company is liable for damages for personal injury suffered by an employe while in its service (that is, while acting within the scope

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of his employment), the employe being free from contributory negligence, (1) "where such injury was caused by the negligence of any person in the service of such corporation [that is, acting within the scope of his employment] who has charge of any \* \* \* locomotive engine or train upon a railway," or (2) "where such injury was caused by the negligence of any person, co-employe or fellow servant \* \* \*, the said person, co-employe or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury having authority to direct". From the words used and the structure and scope of the act, we are of opinion that the concluding clauses of the fourth subdivision limit and qualify only the liability expressed in the second part of the fourth subdivision, and that railroad companies are answerable for the negligence of their servants in charge of signals, telegraph offices, switch yards, shops, round-houses, locomotive engines and trains upon their railways, to their employes the same as to strangers. This was the effect given to the fourth subdivision in the case of *Baltimore, etc., R. Co. v. Little*, 149 Ind. 167, and in *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364. In *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. 301, the complaint alleged that the plaintiff was a freight brakeman in the defendant's service and that he was injured through the negligence of the defendant's engineer. The sufficiency of the complaint to exempt the plaintiff from the operation of the common law rule as to fellow servants and to state a cause of action under the fourth subdivision of the employers liability act, was challenged on the ground that there was no allegation that the engineer was performing the duty of the corporation in that behalf and that the plaintiff was obeying or conforming to the order of some superior having authority to direct. The opinion was written by a member of the court who did not agree with the majority in their

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construction of the fourth subdivision, and there may be difficulty at some points in distinguishing between what he said for himself and what for the court; but we are of opinion that the decision of the court on this point was wholly expressed in the words "the holding of the court is that, in order to make the complaint good under the first part of the subdivision quoted [the fourth subdivision], as to the point in question, it is only required that it state that the engineer, while in the service of appellant, in charge of a locomotive engine, negligently injured the appellee, both being at the time acting in the line of duty as employees of the appellant", and that that holding is not departed from in the present case.

Appellant contends, however, that the construction which limits the operation of the qualifying clauses in the second part of the fourth subdivision to the liability expressed in that part of the subdivision, and which holds railroad companies liable to their employees the same as to strangers for the negligence of their servants in charge of signals, and so forth, brings the first part of the fourth subdivision into conflict with the equality clauses of the federal and State Constitutions. The argument briefly is this: At common law every employer is protected by the doctrine that every employe assumes as an incident of his employment the risks arising from the negligence of his fellow servants; there is no justification for the withdrawal of railroad companies from the general class of employers except the exercise of the police power for the protection of employees; the only reasonable basis for a classification in the exercise of the police power is the protection of employees who are subjected to unusual dangers; a classification that selects for protection only those employees who are subjected to unusual dangers by reason of acting in obedience to the orders of some superior having authority to direct, is constitutional; but a classification that selects for protection all employees without regard to the dangers naturally incident to their work and



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whether they act on their own initiative or in obedience to the order of some superior who has authority to direct (as the attorney of the railroad company and its down-town ticket seller for example), is a classification in name only, is arbitrary, has no relation to the object to be accomplished, discriminates against railroad companies by subjecting them to liability for injuries to a class of employes with respect to whom employers in other businesses are not made liable by the act, and is therefore unconstitutional. Our answer is: It is competent for the legislature, in the exercise of the police power, to take steps for the protection of the lives and limbs of all persons who may be exposed to dangerous agencies in the hands of others; the powerful forces in railroading that are under the direction and control of those in charge of "any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway," were proper to be selected as sources of unusual danger which should be guarded against; the object to be accomplished was to incite railroad companies to use the utmost diligence in the selection and supervision of their servants who are put in charge of these dangerous agencies, so that fewer lives and limbs of those who are entitled to claim the protection of our laws would be sacrificed; the legislature evidently considered that strangers and employes (the attorney and the ticket seller for example) who were not fellow servants of those in charge of the agencies named were sufficiently protected by the railroad companies' existing liability to them for the negligent operation of those dangerous agencies; the legislature evidently determined to protect all persons who were not already protected from the negligent use of particular instruments; the classification is made on the basis of the peculiar hazards in railroading, relates directly to the object to be accomplished, and applies equally to all employers within the class; to separate railroading from other businesses was not an unconstitutional discrimination, because the dangers (the basis of the classification)

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do not arise from the same sources; but the claim that a classification, not made on the basis of the dangerous agencies employed in the business, but founded on the question whether the employe who was injured without his fault by a fellow servant's negligent use of a dangerous agency was acting at the time on his own initiative in the line of his duty or under the orders of a superior, is the only constitutional classification, is unwarranted; a train is wrecked through the negligence of the engineer, two brakemen are injured without fault on their part, one acting at the time in obedience to the conductor's orders, the other acting on his own initiative within the line of his duty; there should be and there is no constitutional limitation upon the legislature's exercise of the police power by which a law may not be enacted to protect both brakemen equally from the negligence of the engineer. We hold, therefore, that the act is not obnoxious to the objections urged by appellant. Under the employers liability acts in other states,—Alabama, Colorado, Iowa, Kansas, Massachusetts,—the argument of appellant in reference to the interpretation of the fourth subdivision of section one of our statute, could not have been advanced, for the corresponding subdivision of their statutes is limited to creating a liability for the negligence of those in charge of signals, engines, etc., in favor of all co-employees. And such legislation has been upheld by the state and federal courts. *Reno, Employers' Liability Acts*, §§84-5; *Missouri, etc., R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107.

It is asserted by appellant that the amended complaint does not charge actionable negligence. The situation was this: Appellee could not hear the engine approaching from the north on account of the noise of the freight train passing over the crossing from the south; his view to the north was obstructed so that he could not see the approaching engine until he came to the west rail of the west track; it was his duty to cross the west track to get the report from

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the conductor of the train on the east track; that train was then passing the crossing and the time had arrived when it was necessary for appellee to cross the west track to get the report; the engineer on the west track knew that it was appellee's duty to get the report; the obstructions between appellee and the approaching engine and also the train on the east track and its position with reference to the crossing were within the view of the engineer; he gave no signal by bell or whistle of his approach, did not stop nor check the speed of his engine, but ran it at twenty miles an hour (about thirty feet a second) upon appellee as he was in the act of stepping on the west edge of the west track. Conceding that the engineer's statutory duties to sound the whistle and ring the bell on approaching a highway crossing and to stop his engine before crossing an intersecting railroad do not apply in this case, it does not follow that the engineer owed no duty to appellee. It was his duty to exercise that diligence for appellee's safety which a man of ordinary prudence would have exercised under like circumstances. Ordinary prudence, not to say common humanity, should have restrained the engineer from hurling a missile of many tons weight at a speed of thirty feet a second at a point where he knew his fellow man was about to step, in discharge of his duty, without any warning (which the engineer might have given) until it was too late to escape the danger.

Appellant suggests that the amended complaint does not show that the negligence charged was the proximate cause of appellee's injury. The averment is that the injuries were inflicted "all without fault or negligence of appellee, but by reason of all of appellant's negligence as herein alleged". Counsel draw a distinction between "appellant's negligence" and the "engineer's negligence". The complaint, they say, charges negligence of appellant in permitting obstructions to view, but that could not be the proximate cause because the risk from that source was apparent to appellee and as-

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sumed by him. The engineer's negligence, if any, they say, is not alleged to be the proximate cause. But a corporation can only act through agents. Under the employers' liability act, a corporation is made answerable for the negligence of an engineer the same as for that of a roadmaster. The engineer's negligence is therefore included in the averment that the injury was due to "all of appellant's negligence as herein alleged". Appellant has shown no error in the ruling on the demurrer.

(2) Under the assignment that the court erred in overruling appellant's motion for judgment on the jury's answers to interrogatories, the first question raised is as to the necessity for appellee's acting at the time of his injury in conformity to the orders of some superior who was present and directing his movements. The answers to interrogatories disclose that appellee was acting upon his own initiative. It was not necessary for appellee to prove that any superior was present and ordering his action.

The jury answered that the target pole was six feet two inches west of the west rail of the west track, and that a person standing against the east side of the target pole could see an engine coming from the north on the west track when it got within about twenty feet. Appellant contends that these answers overbear the general verdict that appellee was free from fault. The jury do not find that appellee occupied the position named when the engine was twenty feet or less away. If he was at that point and the engine was more than twenty feet distant, he could not have seen it. Standing at the east side of the target pole, his body may have taken up a foot or more of the six foot space between the pole and the track. The pilot-beam of the engine may have projected eighteen inches or two feet over the rail. There may have been less than three feet between appellee and the line of danger. He may have listened attentively and heard nothing of the approaching engine on account of the noise made by the freight train. He may have looked

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attentively and found no engine in sight on the west track. He may have taken one step and been unable to check himself and retreat in the two-thirds of a second which the engine took to cover twenty feet. There is nothing in the answers to the interrogatories to negative these conjectures which may have been the evidence. On the other hand, the jury were asked: "Could the plaintiff, just before he was injured, as he approached the track where he was injured, have seen the engine which injured him in time to have avoided it, if he had looked vigilantly to the north?" And they answered "No." Appellant's motion for judgment was properly overruled.

(3) Among the grounds for a new trial it is claimed that the court erred in permitting appellee to contradict the terms of a written contract by parol evidence.

Appellee claims that the evidence<sup>1</sup> is not in the record. The case was tried in 1898, and the sufficiency of the bill is therefore to be determined by the act of 1897. The same objections are made to the bill that were considered and held unavailing in *Diezi v. Hammond Co.*, 156 Ind. 583.

Appellant pleaded a release, and appellee replied that he executed the release without consideration. Appellant proved the execution of the following instrument: "The Indianapolis Union Railway Company to John J. Houlihan, Dr. To amount in compromise of claim for injuries received by him on August 8, 1895, at the Vandalia crossing of the Belt railroad by his being struck by an engine of said company on said Belt railroad while he was attempting to cross the track in the discharge of his duties as a telegraph operator in the employ of said company, said amount being in addition to all fees and charges payable to physicians and St. Vincent's hospital for services and care rendered to said Houlihan on account of such injuries, which amount of fees and charges said company, as a part of said compromise, agrees to pay; and in consideration of the said agreement

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to pay said fees and charges and the amount herein mentioned as a cash payment to him, the said Houlihan, by his signature to the receipt below, does release and discharge the said company from any and all claims, demands, actions and rights of action that he now has or may hereafter have by reason of said injuries and accident. \$25. Approved. Baker & Daniel, Attys. Sept. 25, 1895, received of the Indianapolis Union Railway Company \$25 as payment in full of the above account, in consideration of which I release and discharge said company as above specified. John J. Houlihan. Approved: A. A. Zion, superintendent; James M. McCrea, president." After this contract has been proved and introduced in evidence, it was purely a matter of law for the court to determine whether the consideration from appellant to appellee was contractual or not. If the instrument stated a contractual consideration, parol evidence was not admissible to vary or contradict the consideration expressed; but if the consideration was expressed merely as a recital of a precedent or contemporaneous fact, parol evidence was receivable to prove that the recited fact was untrue, that the recited consideration was not paid at all or paid on a different account. The court held that the consideration from appellant to appellee was not contractual and permitted appellee to testify that there was no consideration for his execution of the release and that the \$25 paid him at the time was a gratuity. This was error. *Pickett v. Green*, 120 Ind. 584; *Conant v. National State Bank*, 121 Ind. 323; *Reisterer v. Carpenter*, 124 Ind. 30; *Stewart v. Chicago, etc., R. Co.*, 141 Ind. 55; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. 289. In *Pickett v. Green*, *supra*, a written contract was executed by the terms of which Pickett, in consideration of the after-expressed covenants of Green, sold his office furniture and the good will of his medical practice to Green, and Green, in consideration of the sale and Pickett's covenants, agreed to pay Pickett \$100. Pickett set up in practice in violation of the contract, and

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in answer to Green's complaint for injunction pleaded that the real consideration for his covenants was Green's undertaking to purchase certain real estate at \$1,400 and that Green had repudiated his agreement. The ruling of the court in sustaining a demurrer to this answer was affirmed. The following extract from *Conant v. National State Bank, supra*, indicates the scope of that decision: "In this instance the appellants can not add to the written contract a stipulation that the sellers of the mill machinery agreed to furnish and place in operation machinery that would manufacture three designated grades of flour, and with a capacity of 100 barrels daily, for the specific and unambiguous provision of the contract is that the sellers agree to furnish and put in operation 'machinery for a 100-barrel mill', and the machinery which they agreed to furnish is particularly described and designated. The provisions of the contract are specific, and these specific provisions can not be supplanted by oral statements. To permit parties to substitute oral statements for written stipulations would render written instruments valueless, and leave to the uncertainty of human memory the terms of contracts". In *Reisterer v. Carpenter, supra*, certain personal property was sold by written contract in which the purchaser agreed to pay therefor by taking up and canceling certain specified debts of the seller. In the absence of any charge of fraud or mutual mistake, the seller was not permitted to show that the consideration for the sale was other than that expressed in the written instrument. On the other hand, the cases of *Stewart v. Chicago, etc., R. Co., supra*, and *Pennsylvania Co. v. Dolan, supra*, are illustrative of the class in which the consideration is not contractual, but is expressed merely as a recital of a fact. In both of these cases the form of the contract was this: Know all men by these presents, that I, for and in consideration of the sum of (a stated number of) dollars, to me paid by the railroad company, the receipt whereof is hereby acknowledged, do release and discharge the railroad

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company from, etc. In such a contract, it is manifest that the railroad company does not agree to pay the sum of money named or to do anything else for the benefit of the other party. The only contractual covenants are those of the employe, and they are made, not in consideration of the company's covenants to pay or do something for the employe, but in consideration of a sum of money recited as having been paid. In this case appellee's covenants of release were made "in consideration of appellant's agreement to pay said fees and charges [to the physicians and hospital] and the amount herein mentioned as a cash payment to him." The consideration on each side was the mutual covenants of the other. In the absence of any issue of fraud or mutual mistake, appellee should not have been permitted to deny that the consideration for his release was correctly stated in the contract.

Other questions as to evidence and instructions are presented, but as they will not necessarily arise on another trial, they are not considered.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

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THE STATE, EX REL. MILLER, v. WEBSTER ET AL.

[No. 19,485. Filed December 10, 1901.]

**APPEAL AND ERROR.—Evidence Not in Record.**—A bill of exceptions containing the evidence is not in the record where there is no order-book entry showing the filing of the bill after it was signed by the judge. *p. 509.*

**SAME.—Transcript.—Authentication by Clerk.**—The transcript of the record of the proceedings in the trial court must be authenticated by the seal of such court, or it will not be considered on appeal. *p. 509.*

From DeKalb Circuit Court; *E. D. Hartman*, Judge.

Action by the State on the relation of Joseph W. Miller, against Henry W. Webster and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*



## Chestnut v. Southern Indiana R. Co.

*E. B. Duntun, W. W. Holmes, F. S. Roby and S. A. Harper*, for appellant.

*J. E. Rose and J. H. Rose*, for appellees.

BAKER, J.—The relator began this action against appellee Webster as principal and his co-appellees as sureties upon the bond of Webster as trustee of Stafford township in DeKalb county, to recover damages alleged to have been occasioned by the failure of the trustee to cause a certain public ditch in his township to be cleaned out and repaired. The liability is predicated upon §10 of the act of 1899. (Acts 1899, p. 53 *et seq.*) The case has been transferred here by the Appellate Court on the ground that the constitutionality of the act of 1889 is involved.

The only error assigned is the overruling of appellant's motion for a new trial. The grounds of the motion relate wholly to the admissibility and sufficiency of the evidence. Appellees insist that the evidence is not in the record. What purports to be an original bill of exceptions is incorporated in the transcript. There is no order-book entry showing the filing of the bill after it was signed by the judge. This was necessary. *Richardson v. Dawson*, ante, 187; *Shirk v. Lingeman*, 26 Ind. App. 630. Furthermore, the clerk of the Dekalb Circuit Court has failed to certify under his hand and the seal of the court that the bill of exceptions is the original or a copy of the bill filed in the cause, if it ever was filed. *Watson v. Finch*, 150 Ind. 183; *Fidelity, etc., Union v. Byrd*, 154 Ind. 47; *Ewbank's Manual*, §117, p. 177. Judgment affirmed.

## CHESTNUT v. SOUTHERN INDIANA RAILWAY COMPANY.

[No. 19,578. Filed December 10, 1901.]

APPEAL AND ERROR.—*Record.*—*Bill of Exceptions.*—*Precipe.*—Where the precipe filed by appellant directed the clerk to prepare and certify a "full, true, and complete transcript of the proceedings, papers on file, and judgment" in the cause, the action of the clerk in certifying the original bill of exceptions was unauthorized, and the same is no part of the record on appeal. pp. 511-514.

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**APPEAL AND ERROR.**—*Trial.*—*Harmless Error.*—Where the verdict of the jury was adverse to plaintiff upon the issue of his right to recover in an action for personal injuries, error in excluding evidence relating solely to the degree of the injury was harmless. *p. 514.*

**MASTER AND SERVANT.**—*Personal Injuries.*—*Railroads.*—*Special Findings.*—In an action against a railroad company for personal injuries caused by the breaking of a brake staff the special findings disclosed that the defect in the staff consisted of a flaw in the metal which was hidden from view and observation, and could not be discovered without removing the ratchet wheel; that the car had been purchased of a manufacturer of cars of good repute, had been inspected on the day previous to the accident, and that an inspection of the car and staff made in the usual manner would not disclose the defect. *Held*, that the court properly overruled a motion for judgment for plaintiff on the findings. *pp. 514, 515.*

**APPEAL AND ERROR.** *Instructions.*—*Evidence Not in Record.*—Where the evidence is not in the record, a judgment will not be reversed because of alleged erroneous instructions unless the instructions are wrong under any supposable state of facts that could have been proved under the issues. *pp. 515, 516.*

**TRIAL.**—*Interrogatories.*—*Appeal and Error.*—Available error cannot be predicated upon the action of the court in refusing to permit counsel to read to the jury interrogatories submitted under §555 Burns 1901, it appearing that the complaining party was accorded the privilege of reading the interrogatories and commenting upon them to the jury from memory. *pp. 516, 517.*

From Lawrence Circuit Court; *W. H. Martin*, Judge.

Action by Lafayette Chestnut against the Southern Indiana Railway Company for damages on account of personal injuries. From a judgment for defendant, plaintiff appeals. *Affirmed.*

*J. R. East, R. H. East and McHenry Owen*, for appellant.

*F. M. Trissal, T. J. Brooks and W. F. Brooks*, for appellee.

**JORDAN, C. J.**—Action below by appellant to recover for personal injuries sustained while in the service of appellee in its yards at the city of Bedford. The injury in question is attributed to a defective brake staff, which, when being handled by appellant, broke near the ratchet wheel,

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and thereby he was thrown from the car and severely injured. The complaint charges the negligence of the appellee to be as follows: "That the defendant was negligent and careless in this, to wit: That in the construction, the brake staff on car number 814, and the one which caused the injury hereinafter alleged, was made of inferior metal, and had been slightly bent above the ratchet wheel, and that said brake staff so constructed had at some time prior to said date been cracked, and had a flaw in it which rendered it easily broken and dangerous to defendant's employes, in attempting to set the same; that for three months prior to said date defendant knew, or with a reasonable inspection could have known, that said brake staff was made of defective material; had a flaw in the staff; that it was cracked almost entirely across, leaving but a small part of the staff attached together; that it was wholly unfit for the use it was put to on said car, and that its use in its condition was dangerous, unsafe to defendant's employes, etc.," The absence of knowledge of all of these matters on the part of plaintiff is alleged in the complaint. Damages in the sum of \$20,000 are demanded.

The complaint was held sufficient on demurrer and appellee answered by a general denial. On December 22, 1900, the cause was submitted to a jury for trial, and a verdict in favor of the appellee was returned, together with answers to a series of interrogatories submitted to the jury by the court. Motions by appellant for judgment on the answers to the interrogatories, and for a new trial, were each denied, and judgment for costs was rendered against him. The errors assigned are based on the rulings denying these respective motions.

The principal points which counsel for appellant seek to have reviewed relate to the giving of certain instructions and to the admission and exclusion of certain evidence. The original bill of exceptions containing the original long-hand manuscript of the evidence, together with the rulings

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of the court in admitting and excluding evidence, has been certified to this court as a part of the record in this appeal. The transcript discloses that appellant, by his counsel, filed in the office of the clerk of the lower court a precipe which is appended to the record, whereby he requested and directed that the clerk make out and certify a transcript of the proceedings and record, as follows: "*Lafayette Chestnut v. Southern Indiana Railway Company*, Lawrence Circuit Court. The clerk of the Lawrence Circuit Court will prepare and certify a full, true, and complete transcript of the proceedings, papers on file, and judgment in the above entitled cause, to be used on appeal to the Supreme Court. East, East & Owen, attorneys for plaintiff." Immediately after this precipe appears the general certificate of the clerk, which is as follows: "Certificate to transcript. State of Indiana, Lawrence county, ss: I, Isaac H. Crim, clerk of the Lawrence Circuit Court of said State, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the papers and entries in said cause. In witness whereof I hereunto set my hand and affix the seal of said court, at the city of Bedford, Indiana, this 29th day of January, 1901. Isaac H. Crim, clerk Lawrence Circuit Court." Following this certificate appears what purports to be the original bill of exceptions embracing the evidence given upon the trial and also purporting to exhibit the rulings of the court in admitting and rejecting certain evidence. To this bill the clerk has attached a special certificate whereby he certifies that such bill of exceptions is the original which was filed in his office "and is now incorporated into and made a part of the record in said cause without copying."

Under the rule asserted and enforced in *Johnson v. Johnson*, 156 Ind. 592, the evidence and the rulings of the court in admitting and excluding testimony are not properly before us, and cannot be considered in this appeal for any purpose. In *Johnson v. Johnson*, *supra*, this court said:

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“Only such papers and entries as are designated in said precipe are properly a part of the record on appeal. Said precipe did not direct or request the clerk to certify to this court said original bill of exceptions containing the evidence, in any manner. Under such conditions if said original bill of exceptions containing the evidence was embodied in the transcript, and properly authenticated, the same would not be a part of the record and could not be considered. *McCaslin v. Advance Mfg. Co.*, 155 Ind. 298, and cases cited; *Brown v. Armfield*, 155 Ind. 150.”

By the act of 1897, Acts 1897, p. 244, §638a Burns 1901, the clerk of the lower court is authorized to certify to this court on the appeal of a cause the original bill of exceptions containing the evidence and the rulings of the court in respect to the admission and rejection of evidence, etc., instead of a copy thereof only upon the request of the appealing party. *Adams v. State*, 156 Ind. 596, p. 600 of the opinion. In fact, this is the plain wording of the statute of 1897, *supra*, and is not open to construction. It is expressly disclosed by the precipe in this case that appellant directed the clerk below to prepare and certify a “full, true, and complete transcript of the proceedings, papers on file, and judgment in the above entitled cause, to be used on appeal to the Supreme Court.” Under the directions given to the clerk in the precipe in question it became his duty to certify to this court a transcript or copy of the original bill of exceptions containing the evidence and the rulings of the court in the admission or exclusion of testimony, and his act in certifying the original bill was, under the statute, unauthorized. Where the clerk of a trial court has certified to this court on appeal of a cause the original bill of exceptions embracing the evidence, we will presume that the clerk has done so upon the request of the appealing party in discharge of the duty enjoined upon him by the statute in question, in the absence of anything appearing in

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the record to the contrary. But we can indulge in no such presumption in this case in the face of the positive direction or request of the appellant appearing herein, to the effect that a transcript or copy of the original bill should be prepared by the clerk and certified as a part of the record in this appeal. As the bill of exceptions in controversy is not in the record, consequently there is nothing to disclose to us what evidence was given upon the trial of the cause or to exhibit the rulings of the court on the admission or rejection of the testimony of which appellant complains; hence, none of the questions in respect to such rulings can be considered. Again, upon another view, it appears by the argument in the briefs filed by the respective parties, that a part of the testimony, at least about the admission of which appellant complains, relates solely to the degree of the injury which he had sustained by reason of the accident. Consequently such evidence could have a bearing only on the question of the amount of damages which should be awarded in the event it was found that, under the evidence, the appellant was entitled to a recovery upon his cause of action. As the verdict of the jury was adverse to him upon the issue of his right to recover, the exclusion or admission of any evidence bearing upon the question of the amount of damages, under the circumstances, would be harmless. *Ellis v. City of Hammond, ante*, 267.

The findings of the jury upon the interrogatories disclose that the defect in the brake staff consisted of a flaw in the metal which was hidden from view or observation; that this defect in the staff could not have been discovered without loosening and removing from its place the ratchet wheel from said staff; that the car upon which the brake staff had been placed in the construction of the car was purchased in March, 1898, by appellee, from a manufacturer of cars in good repute and of a recognized standing in the manufacture of cars. On the day previous to the accident appellee made an inspection of the car in controversy, but the

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jury find that an inspection of the car and staff made in the usual and customary manner would not disclose the defect in the brake staff. These findings were certainly in harmony with the general verdict and no error can be predicated on the action of the court in overruling appellant's motion for judgment thereon.

We have examined the instructions about which appellant complains, and are of the opinion that none of them can be considered faulty or wrong upon any supposable state of facts that might have been proved within the issues in the case. Consequently we must be controlled by the rule asserted in *Rapp v. Kester*, 125 Ind. 79; *Wenning v. Teeple*, 144 Ind. 189. In the absence of the evidence we are bound to presume that the instructions in question were applicable thereto. It was not essential for appellant to incorporate into the record all of the evidence given in the cause in order to present for a review by this court purely legal questions arising on the giving or refusal of instructions or on the rulings of the court in admitting or excluding evidence. He was at liberty to have pursued the method provided by §662 Burns 1901, §650 Horner 1897, and prescribed by the rule asserted in *Mercer v. Corbin*, 117 Ind. 450, 3 L. R. A. 221, 10 Am. St. 76; *Jones v. Foley*, 121 Ind. 180; *McCoy v. State ex rel.*, 121 Ind. 160; *Bain v. Goss*, 123 Ind. 511; *Wright v. City of Crawfordsville*, 142 Ind. 636. Where, however, an appealing party, as in this case, assumes to bring all of the evidence into the record by a bill of exceptions, and elects to present his appeal by that method, he must pursue the course pointed out by the decisions of this court which control in such cases, and where for any reason the evidence is not properly before us, he can not successfully demand a reversal of the judgment on the ground of erroneous instructions, unless he shows that some one or all thereof are radically wrong under any supposable state of facts that could have been proved under the issues of the case, and that such instruction or instructions direct the

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minds of the jury to an improper or wrong basis upon which to found their verdict. *Rapp v. Kester*, 125 Ind. 79.

It is disclosed by a bill of exceptions that on the trial of the cause and after the evidence had been closed, but before the argument in the case had commenced, that the court announced that it would submit to and instruct the jury to answer certain interrogatories numbered from one to twenty-eight, in the event they agreed on a general verdict; that counsel for appellant in opening the argument to the jury requested the court to allow him to read each of said interrogatories to the jury and comment thereon in his argument. This request, over appellant's exception, the court denied. Thereafter counsel for appellant took copies of the interrogatories numbered from twelve to seventeen and attempted to read each of them to the jury, and to advise the jury how to answer them according to the evidence. This the court would not permit, but announced to counsel for appellant that he might argue the facts in the case fully to the jury, but that he must argue them in respect to the said interrogatories from memory only; that he would not be permitted "to take the interrogatories to the jury and tell the jury how to answer the same." By this ruling it is insisted that the court erred. In this contention we cannot concur. By §1 of an act approved March 4, 1897 (Acts 1897, p. 128), §555 Burns 1901, it is provided: "That in all actions hereafter tried by a jury, the jury shall render a general verdict, but in all cases when requested by either party, the court shall instruct them when they render a general verdict to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories on any or all the issues in the cause," etc.

We know of no rule or principle declared either by any statute in force in this State or by what is commonly denominated the "unwritten law" which required the court to award to appellant the particular right which his counsel demanded. The privilege of reading to the jury either the



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original interrogatories or copies thereof as demanded by counsel was purely a matter of favor with the court, which it might either grant or deny. It does not appear that counsel for appellant was not accorded the privilege of examining the interrogatories which the court announced he would submit to the jury, but it does expressly appear that he was permitted to argue fully all of the facts and evidence in the case and to argue from his memory in respect to the interrogatories and the evidence and facts bearing thereon by which the jury was to be controlled in returning their answers thereto. This was all that appellant, under the circumstances, was entitled to demand. The object of the statute authorizing the submission of interrogatories to the jury is not for the purpose of permitting counsel for the respective parties to read them to the jury, but is intended to enable the jury under the evidence to find specially upon particular and material questions of fact, in the event they return a general verdict.

Finding no available error the judgment is affirmed.

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[No. 19,501. Filed December 11, 1901.]

**CRIMINAL LAW.**—*Conviction for Violation of Penal Statute.—Appeal.*

—One convicted for having violated a penal statute can have no questions under the statute reviewed on appeal which were not raised in his particular case. *p. 520.*

**FOOD.**—*Adulteration.—Prosecution Under Act of 1899.*—An affidavit charging one with having for sale adulterated milk, in violation of §2 of the act of February 28, 1899 (Acts 1899, p. 189), need not disclose whether any property was taken from defendant, or how the evidence against him was procured, and it is therefore immaterial whether or not the act provides for the taking of property without just compensation. *pp. 519-521.*

**CONSTITUTIONAL LAW.**—*Delegation of Legislative Authority.*—The provision of the pure food law of 1899 (Acts 1899, p. 189), that within ninety days after the passage of the act the board of health shall adopt measures necessary to facilitate the law's enforcement, and prepare rules regulating minimum standards of foods, defining

157	517
160	538
157	517
168	66
168	185
168	568
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specific adulterations, etc., does not render the law violative of §25, article 1, of the Constitution, which provides that "no law shall be passed, the taking effect of which shall be made to depend upon any authority except as provided in the Constitution." pp. 521-523.

**CONSTITUTIONAL LAW.—*Delegation of Legislative Authority.***—The provision of the pure food law of 1899, that the State Board of Health shall adopt such measures as may be necessary to facilitate the enforcement of the law is not a delegation of legislative authority. pp. 521-523.

**STATUTES.—*Title of Act.***—It is not essential to a good title that the subject of the act shall be expressed in exact terms. It is sufficient if the subject is fairly deducible from the language employed. p. 524.

**FOOD.—*Constitutionality of Pure Food Law of 1899.—Title of Act.***—The following title of the pure food act of 1899: "An act forbidding the manufacture and sale, or offer for sale, any adulterated foods or drugs, defining foods and drugs, stating wherein the adulterations of foods and drugs consist, and defining the duties of the State Board of Health," etc., is not in violation of the constitutional requirement that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." pp. 523-525.

**CRIMINAL LAW.—*Penal Statute.—Prohibitory Section.***—The fact that the prohibitory section of a penal statute does not include an act for which a penalty is imposed in a later section, does not render such later section invalid. p. 525.

**FOOD.—*Violation of Pure Food Law.—Affidavit.***—An affidavit charging defendant with violating the pure food law of 1899 (Acts 1899, p. 189), and reciting that he "had in his possession, with intent to sell, one pint of milk, adulterated with a certain substance injurious to health, to wit, formaldehyde," is not bad for want of an allegation that formaldehyde is either poisonous or injurious to health. p. 526.

**SAME.—*Violation of Pure Food Law.—Affidavit.***—An affidavit charging defendant with having in his possession adulterated food, need not allege that the food was adulterated by defendant. p. 526.

**SAME.—*Enforcement of Pure Food Law by Others Than Board of Health.***—The provision of §2 of the pure food law of 1899, that it shall be the duty of the State Board of Health to enforce the provisions of such law, does not exclude individuals from making complaint against one for violation of the statute. p. 526.

**SAME.—*Adulterated Milk.—Affidavit.***—Where one is charged with having in his possession, with intent to sell, milk adulterated with a substance injurious to health, it is not necessary that the affidavit charging the offense should allege that the milk in defendant's possession violated a certain standard fixed by the State Board of Health. p. 527.

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**FOOD.—Adulterated Milk. — Affidavit.**— An affidavit charging one with having for sale adulterated milk, need not set out the proviso of §1 of the pure food law, that the law shall not apply to mixtures or compounds recognized as articles of food, and not injurious to health. p. 527.

**OPINION EVIDENCE.— Physician as an Expert Witness.**— Where a physician exhibits such a degree of knowledge as to make it appear that his opinion is of some value, he is entitled to testify, though his knowledge is gained from reading, study and conversations with other physicians, and not from his own experiments. pp. 527, 528.

**FOOD.— Adulteration of Milk.— Evidence.— Directing Verdict.** — Where, in a prosecution of one charged with “knowingly” having adulterated milk in his possession, with intent to sell the same, the evidence showed that in the middle of the forenoon in the hot season of the year, defendant had the adulterated milk in his exclusive possession, with intent to sell and deliver it to a customer, it was proper to refuse to instruct the jury to return a verdict for defendant on the ground that it had not been proved that defendant had knowledge of the adulteration. pp. 528, 529.

**SAME.—Adulteration of Milk.—Evidence.**—Defendant was charged with having in his possession, with intent to sell, milk adulterated with formaldehyde. He testified that he had used no formaldehyde, and that the milk contained none, to his knowledge, but that at the time in question he had put into the milk a substance known as “Palmer’s Preserver,” and that the maker of the substance had told him that it contained no formaldehyde. Defendant was then asked what representations had been made to him as to the substance used, but was not permitted to answer, and a circular was offered in evidence and excluded, which accompanied the preservative and which stated that it was harmless and guaranteed to contain no acid or injurious ingredient. *Held*, that the exclusion of the evidence was reversible error. pp. 530, 531.

From Marion Criminal Court; *Fremont Alford*, Judge.

Luther J. Isenhour was convicted of violating the pure food law of 1899, and appeals. *Reversed*.

*R. O. Hawkins* and *H. E. Smith*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State,

**HADLEY, J.**—Appellant was convicted on an affidavit charging him with “unlawfully and knowingly having in his possession, with intent to sell the same, a certain substance

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intended for food, to wit, one pint of milk then and there adulterated with a certain substance injurious to health, to wit, formaldehyde". Appellant's motions to quash the affidavit, and for a new trial, were overruled. Section 2 of the act of 1899, commonly known as the pure food law (Acts 1899, p. 189) in part provides: "Whoever fraudulently adulterates, for the purpose of sale, bread or any other substance intended for food with any substance injurious to health, or knowingly barter, gives away, sells or has in his possession with intent to sell, any substance injurious to health, shall be fined in any sum not exceeding \$100."

I. It is insisted that this act violates the following provisions of the State Constitution: (1) Section 21, article 1, which provides that "no man's property shall be taken by law without just compensation." (2) Section 25, article 1, which provides that "no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." (3) Section 19, article 4, which provides that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

1. From the beginning it should be borne in mind that appellant is charged with having in his possession adulterated milk with intent to sell the same, in violation of law. This and nothing more. He has the right therefore to call upon this court to review his conviction upon this particular charge, but he has no right to ask us to decide questions under the pure food law that do not arise in his case, and in which he has no special interest. *Henderson v. State*, 137 Ind. 552, 564, 24 L. R. A. 469; *Fessler v. Brayton*, 145 Ind. 71, 84, 32 L. R. A. 578; *Pittsburgh etc. R. Co. v. Montgomery*, 152 Ind. 1, 13, 71 Am. St. 301.

It is not disclosed by the affidavit that appellant had any property taken at all, or how the evidence against him was procured, nor is it necessary to the validity of the affidavit that it should be so disclosed; neither

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can it be assumed that it was procured by a sample of the milk obtained in the way pointed out by the statute, as that method does not exclude competent evidence from any other proper source. Appellant is not being tried for resisting a seizure of his property, and it is therefore immaterial in this case whether the act of 1899 provides for the taking of property without just compensation. The only constitutional question that concerns the appellant is whether the penal provision of the act of 1899 under which he has been convicted has been enacted in the observance of constitutional requirements.

2. Does the act violate §25, article 1, providing that "no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution?" The pure food law provides that "within ninety days after the passage of this act the board of health shall adopt such measures as may be necessary to facilitate the enforcement thereof, and shall prepare rules and ordinances where and when necessary regulating minimum standards of foods and drugs, defining specific adulterations, and declaring the proper methods of collecting and examining drugs and articles of food." From this provision it is argued that the law could not become effective and "could not be violated until the state board met, within ninety days, prepared its rules, and passed its ordinances, regulating minimum standards, defining adulterations, and declaring the methods of collecting and examining foods" and is, in substance, an attempted delegation of legislative power to the State Board of Health. The obvious purpose of the provision last quoted was to commit to a body of learned and scientific experts the duty of preparing such rules, and prescribing such tests as may from time to time, in the enforcement of the law, be found necessary in determining what combination of substances are injurious to health, and to what extent, if at all, admixtures, or deteriorations of foods and drugs, may go, without injuriously affecting the

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health of the consumer. That which is required of the State Board of Health has no semblance to legislation. It merely relates to a procedure in the law's execution for a reliable and uniform ascertainment of the subjects upon which the law is intended to operate. Nor does the duty imposed upon the state board in any sense postpone the taking effect of the law until the duty is performed. Performance can never be said to be complete. The duty is continuing, and will arise at any time when a new food or drug is put forward. Besides it is paradoxical to say that the law is not effective until the state board have acted, when it is certain that without the law they could not act at all. And to say their act puts the law in operation is to excuse them from acting, because no law requires it. This class of legislation emanates from an exercise of the police power of the State for the protection of the public health. The power of the legislature, and its right to determine, for itself, when an emergency for such legislation exists, and the means and instrumentalities necessary to accomplish the end in view, is no longer a doubtful question. The peculiar character of the subject, embodying as it does considerations of sanitary science, is such as to require for just legal control something more than legislative wisdom, to designate accurately the subjects and instances intended to be affected. The classification of these subjects, and the prescribing of rules by which they may be determined by a qualified agent is not legislation, but merely the exercise of administrative power. The law itself is complete and effective in all its parts. In respect to the matters to be determined by the State Board of Health in its execution, it awaits the performance of these duties. When performed, the law operates upon the things done by the board. While unperformed, the law remains ready to be applied whenever the preliminary conditions exist.

It is said in *Blue v. Beach*, 155 Ind., 121, on p. 130: "In order to secure and promote the public health, the State

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creates boards of health as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules, and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations, is generally recognized by the authorities." See, also, *Overshiner v. State*, 156 Ind., 187; 51 L. R. A. 748, 83 Am. St. —; *State, ex rel., v. Board of Pharmacy*, 155 Ind. 414; *Groesch v. State*, 42 Ind. 547, 556; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind., 185, 220.

3. Is the title of the act multifarious, and in conflict with the constitutional requirement that "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title?" The title of the act is as follows: "An act forbidding the manufacture, sale or offering for sale of any adulterated foods or drugs, defining foods and drugs. Stating wherein adulteration of foods and drugs consists and defining the duties of the State Board of Health in relation to foods and drugs, their inspection, purity, adulteration, declaring penalties for the violation of the laws, rules and ordinances concerning foods and drugs, also liquors used or intended for drink, repealing acts in conflict therewith."

It must be conceded that this title is unskillfully drawn, and contains much unnecessary verbiage. This however does not necessarily make it bad. It is contended that there are three distinct subjects expressed: (1) Adulteration of foods; (2) adulteration of drugs, and (3) adulteration of liquors used or intended for drink. It has been many times declared by this court that in deciding questions as to the

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constitutionality of a statute, the law will be upheld unless its repugnance to the Constitution is so manifest as to remove all reasonable doubt. *Gustavel v. State*, 153 Ind. 613, and cases cited.

In the case before us it is readily seen that the subject of the act, and the only subject, is the protection of the people from imposition as a result of harmful adulteration of certain things consumed by them. The entire scope of the law might have been sufficiently expressed as "an act concerning adulterations," or "as an act for the protection of the people against adulterations." It is not essential to a good title that the subject of the act shall be expressed in exact terms; it is sufficient if the subject is fairly deducible from the language employed. And while it serves no useful purpose to embrace in the caption anything but the general subject of the act, a statement of the subsidiary means and methods to be pursued in attaining the end or purpose of the law does not make the title bad. The proper test in all questions of this sort is—does the body of the particular legislation embrace more than one general subject, and such matters as are calculated to assist in reaching the single object intended, and is that subject disclosed by the title? If thus tested it appears that an act embraces but one subject and matters properly connected therewith, and that that subject is shown by the title, it must be held to be constitutional; otherwise not. Forbidding the manufacture and sale of any adulterated foods, drugs, or drinks, defining prohibited foods, drugs, and drinks, and the duties of the State Board of Health in relation to the inspection and prescribing of standards of purity of foods, drugs, and drinks, and declaring penalties for the violations of the law, are all matters clearly tending to a common end, and which unmistakably disclose what that end is. The title of the pure food law of Minnesota reads: "An act in relation to the manufacture and sale of baking powders, sugars and syrups, vinegars, lards, spirituous and



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malt liquors, to prevent fraud, and to preserve the public health." Minn. Gen. Law, 1889, p. 48. The supreme court in trying the act by their constitutional provision similar to ours say: "The act does not embrace more than one subject, within the meaning of the constitutional prohibition. The act may be fairly designated as one relating to the adulteration of various articles of food and drink, and its provisions are properly related to that general subject." *Stolz v. Thompson*, 44 Minn. 271. See, *Gustavel v. State*, 153 Ind. 613; *Central Union Tel. Co. v. Fehring*, 146 Ind. 189; *State v. Gerhardt*, 145 Ind. 439, 458, 33 L. R. A. 313; *Henderson v. State ex rel.*, 137 Ind., 552, 558, 24 L. R. A. 469.

II. It is next contended that the facts stated in the affidavit are insufficient, for many reasons, to constitute an offense against the laws of the State.

(a) The first and prohibitory section of the act provides "that no person shall, within this State, manufacture for sale, offer for sale, or sell, any drug or article of food which is adulterated within the meaning of this act." It will be noted that the things prohibited by this section do not include the "having in possession with intent to sell." In the second and penalty section it is provided that "Whoever \* \* \* knowingly \* \* \* has in his possession with intent to sell, any substance injurious to health, shall be fined," etc. It is claimed that because the act with which appellant is charged,—“having in his possession with intent to sell”—not being one of the things enumerated in the prohibitory section of the law, the mere affixing of a penalty to the act in a subsequent section does not make it unlawful and punishable. The claim cannot be allowed. It will not do to say, in such cases, that the legislature intends to inflict a penalty for the doing of a lawful act, and hence it is held that the imposition of a penalty for the doing of an act is equivalent to a positive prohibition of the act. *Skelton v. Bliss*, 7 Ind. 77; *Bartlet v. Viner*, Skinner 322; *Mitchell*

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v. *Smith*, 1 Binney (Pa.), 110, 113, 2 Am. Dec. 417; *In re City of Buffalo*, 68 N. Y. 167, 173; Black on Int. of Laws, 65; Sutherland on Stat. Con. §§335, 336.

(b) There is no substance in the contention that the affidavit is bad for want of an allegation that formaldehyde is either poisonous or injurious to health. It is averred that the defendant "had in his possession, with intent to sell the same, one pint of milk, then and there adulterated with a certain substance injurious to health, to wit, formaldehyde." This is sufficient.

(c) The same may be said of the objection to the affidavit because it contained no averment that the milk was adulterated by the defendant. If the defendant knowingly had in his possession adulterated milk with intent to sell the same, it was not of the slightest consequence who adulterated it.

(d) The next objection to the affidavit is that it does not disclose that the prosecution was begun by the State Board of Health as required by the law. The act provides (§2) "it shall be the duty of the State Board of Health to enforce the laws of this State governing food and drug adulterations." Similar provisions are found in the medical law (Acts 1897, p. 259), and in the dental law (Acts 1899, p. 482), and are very common in the laws of other states. We cannot believe that the General Assembly, by imposing a special duty upon specified officers to enforce the statute, meant that individuals should be excluded from making complaint. The law is general, and has a general application. The interdictions prescribed by the act are for the public welfare, as much for one as for another, and it cannot be assumed that the legislature by conferring a duty upon certain officers to enforce the law intended that its enforcement should depend wholly upon the pleasure or discretion of such officers. We see no reason for distinguishing this from other public offenses, in its general object and purpose, or why any one entitled to the law's protection

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may not institute its enforcement, as he may, ordinarily, do in other cases. The evident intent was to confer upon the State Board of Health official duty, in addition to common individual right, to put the law in motion in proper cases. *Commonwealth v. Gay*, 153 Mass. 211, 217; *Commonwealth v. McDonnell*, 157 Mass. 407.

(e) The affidavit is further assailed because it does not charge that the State Board of Health had fixed a standard of purity, nor that the milk in defendant's possession violated the standard, as provided by the act. Appellant is not charged with violating a standard. And the character of the act for which he is prosecuted is not determined by a standard. He is called upon to answer for having in his possession with intent to sell milk adulterated with a substance injurious to health. The having in possession with intent to sell adulterated food that may in any material degree injuriously affect the health of the consumer is positively forbidden by that provision of the law under which appellant is prosecuted. Whether or not the State Board of Health had fixed standards of purity in the matters required of them cannot avail one as a defense to a charge in which no standard is required.

(f & g) It was not necessary for the affidavit to show that the State Board of Health had prepared rules and ordinances, and defined adulterations, and that the milk in possession of appellant violated some rule, ordinance, or standard. The offense with which appellant is charged is independent of all action of the board and is not affected by anything they may do, or leave undone.

(h) This objection is like the preceding, and for the same reason is invalid.

(i) The last objection to the affidavit is that the proviso of section one is not pleaded. This was not necessary. *Ferner v. State*, 151 Ind. 247. The affidavit was sufficient.

III. Five reasons for a new trial are argued. (1) John F. Geis, a witness for the State, testified that he was by pro-

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fession a chemist, had been practicing his profession for between ten and fifteen years, and was and had been also a practicing physician for eight years; he had examined the milk in question for, and had found therein, formaldehyde; he knew the effect of formaldehyde on the caseine of milk; this knowledge was acquired, not from experiments, but wholly from reading, study, and conversations with other physicians. The question was then propounded: "What is the effect of formaldehyde on milk as a substance of food?" To which appellant objected for the reason that the witness had only shown knowledge from reading and conversations with others, and not from experiments, and therefore was not a competent and qualified witness on the subject. The witness was permitted to answer. Courts have never undertaken to set up a standard of scientific knowledge by which the competency of a witness may be determined, and have not gone to the extent of holding that a scientific witness can only testify from facts learned by him from personal demonstration. The general rule, in such cases, in this State at least, seems to be that where a witness exhibits such a degree of knowledge, gained from experiments, observation, standard books, or other reliable source, as to make it appear that his opinion is of some value, he is entitled to testify, leaving to the trial court, in the exercise of a sound discretion, the right to say when such knowledge is shown, and to the jury the right to say what the opinion is worth; and, as in all other cases of discretion, this court will review the action of the trial court only when that discretion clearly appears to have been abused. *Jenney Electric Co. v. Branham*, 145 Ind. 314, 320, 33 L. R. A. 395; *Parker v. State*, 136 Ind. 284, 288; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 550; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 85, 57 Am. Rep. 82; *Carter v. State*, 2 Ind. 617; *Shover v. Myrick*, 4 Ind. App. 7, 16. It is clear that there was no abuse of discretion in this instance.

2. At the conclusion of the State's evidence, appellant

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moved the court to instruct the jury to return a verdict for him on the ground that no knowledge had been shown in the defendant of the presence of formaldehyde in the milk. The refusal of the court to give this instruction is complained of. The statute is: "Whoever knowingly \* \* \* has in his possession", etc. It must be conceded that under a plea of not guilty it was incumbent upon the State to satisfy the jury beyond a reasonable doubt that the defendant knew there was formaldehyde in the milk. But it was not essential that this proof should be positive and direct. It was sufficient if the State had proved a state of facts from which knowledge might be reasonably and naturally inferred. And it was the duty of the court to overrule appellant's motion if there were such facts in evidence as were calculated to support inferences of guilty knowledge. The record discloses no direct evidence of knowledge, but it is shown that about 10 o'clock a. m., in the month of July, appellant was found with his milk wagon in the streets of Indianapolis, and upon demand gave up to the dairy inspector a pint of milk, appellant saying, as a protest of the demand, that it was the last quart of milk he had, and if it was taken he would be required to purchase other milk to serve his last customer. The milk so surrendered was found to contain formaldehyde. From this it appears that in the middle of the forenoon, in the hot season, appellant had the adulterated milk in his exclusive possession with intent to sell and deliver it to a customer. It is a thing in the common knowledge of the people, and hence known to the court, that milk is a substance that will not in warm weather remain in a merchantable condition, as sweet milk, more than a few hours, and that it very soon becomes unfit for food, *Ross v. Boswell*, 60 Ind., 235, and it might therefore have been inferred that the particular milk in question had been drawn and in the possession of appellant but a short time. Under such circumstances in the absence of any explanation of how

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the recently drawn and consequently recently adulterated milk came into appellant's possession, the jury had the right to determine the strength of the inference that would naturally arise therefrom. Being found in exclusive possession of milk recently adulterated made it incumbent upon appellant to show that it was not adulterated by him. His situation seems to us precisely analogous to that of one found in the possession of recently stolen goods, or of counterfeit money. With respect to stolen property it was said by this court in *Johnson v. State*, 148 Ind. 522, on p. 524: "When it is proved that property has been stolen, and the same property, recently after the larceny, is found in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession, and of showing that such possession was innocently acquired; and if he fails to so satisfactorily account for such possession, or gives a false account, the presumption arises that he is the thief." See, also, *Madden v. State*, 148 Ind. 183, 187; *Campbell v. State*, 150 Ind. 74, 76; *Goodman v. State*, 141 Ind. 35. Appellant's motion to instruct the jury was properly overruled.

3. Appellant was permitted to testify that he never used any formaldehyde, and that the milk in question had no formaldehyde in it to his knowledge; that he did the same morning before leaving home put a teaspoonful of a substance known as Palmer's Preserver in nine gallons of milk of which the sample in controversy was a part; that upon inquiry Palmer had previously told him that the preserver had no formaldehyde in it. He was then asked by his attorney to state "what representations were made to you, either in print, writing, or verbally, or in any other way, as to this preservative, prior to the time you used it?" Upon the State's objection that the question asked called for hearsay, appellant was denied the right to answer. In the same connection appellant offered in evidence a printed circular accompanying the Palmer's Preserver when the same was

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purchased by the defendant. Among other things it was stated in the circular: "Perfectly harmless, odorless, tasteless, and cheap. Guaranteed to contain no acid, or injurious ingredient. \* \* \* Remember this is positively not an adulterant." This circular was also refused. While the possession of milk recently adulterated with a substance injurious to health required appellant to show affirmatively that such adulteration was without his knowledge, yet, he was entitled to the fullest opportunity to do so. If in fact he had no knowledge, and had a sufficient excuse for want of knowledge, he was entitled to show it. The law will not permit the State to construct about a defendant a circumstantial case, and then deny him an opportunity to explain the circumstances consistently with his innocence. If appellant used the preserver, honestly believing, after making reasonable inquiry and investigation, that it contained no formaldehyde or other substance injurious to health, then he was not guilty of "knowingly," etc. What he did to ascertain the fact about it, who he inquired of, what was said to him by others in whom he might reasonably confide, what was exhibited to him, in writing or printing, and the trustworthiness thereof, were all proper subjects to lay before the jury in explanation of his assertion that he did not, at the time, know the milk contained a substance injurious to health; and if the facts he was thus able to show should be sufficient to overcome the presumption of guilty knowledge raised by the possession, it would have been the duty of the jury to acquit.

It should be borne in mind that this prosecution was under the pure food act of 1899. If it had been under the act of 1901 (Acts 1901, p. 429, §§2165a, 2165b Burns 1901), a very different question as to knowledge would arise.

We are unable to say that the exclusion of the proffered evidence worked no harm to the defendant, and for this reason the cause must be reversed.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

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Tilden v. Louisville, etc., Co.

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**TILDEN v. LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY.**

[No. 19,613. Filed December 11, 1901.]

**PLEADING.—*Rejecting False Pleading.***—Under §885 Burns 1901, a complaint shown to be false by the answers of plaintiff to special interrogatories is properly rejected on motion. *pp. 532, 533.*

**APPEAL AND ERROR.—*Record.—Pleading.—Amendment.***—An original complaint superseded by an amended complaint, although copied in the transcript, is not a part of the record, and cannot be considered on appeal. *pp. 533, 534.*

**SAME.—*Record.—Rejected Pleading.—Answers to Interrogatories.***—A rejected pleading and answers to special interrogatories propounded under §885 Burns 1901 can only be made a part of the record by bill of exceptions or by order of court. *pp. 533, 534.*

**SAME.—*Record.—Rejected Pleading.—Bill of Exceptions.***—A rejected complaint and answers to interrogatories propounded to plaintiff under §885 Burns 1901, for the purpose of ascertaining whether the pleading was false, do not constitute a part of a bill of exceptions unless copied into it at full length before it is signed, or appropriately referred to and the proper place for insertion designated by the words "here insert," as required by §688 Burns 1901. *p. 534.*

From Clark Circuit Court; *J. K. Marsh*, Judge.

Action by Mary M. Tilden against the Louisville and Jeffersonville Ferry Company for personal injuries. From a judgment for defendant and overruling plaintiff's motion to dismiss the action, plaintiff appeals. *Affirmed.*

*C. L. Jewett* and *H. E. Jewett*, for appellant.

*G. H. Voigt*, for appellee.

**MONKS, J.**—This action was brought by appellant against appellee to recover damages for personal injuries. An amended complaint was filed. Afterwards, appellee filed a motion to reject the complaint for the reason that the same "is shown to be false in fact by the answers of plaintiff to special interrogatories propounded to her to ascertain whether said complaint is false." The court sustained this motion and ordered and adjudged that said complaint be



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rejected. Appellant thereupon moved the court for leave to dismiss said action, which motion the court overruled and refused to allow appellant to dismiss said action and rendered final judgment against her. The errors assigned and not waived by a failure to argue the same call in question the action of the court in sustaining appellee's motion to reject the complaint.

Under the provisions of §385 Burns 1901, §382 R. S. 1881 and Horner 1897, if a complaint is shown to be false by the answers of plaintiff to special interrogatories it is proper to reject the same on motion. *Close v. Pittsburgh etc., R. Co.*, 150 Ind. 560; *Moyer v. Brand*, 102 Ind. 301; *Lowe v. Thompson*, 86 Ind. 503.

Section 385 (382), *supra*, was enacted after the cases of *Boggess v. Davis*, 34 Ind. 82 and *Mooney v. Musser*, 34 Ind. 373, cited by appellant, were decided, and establishes a different rule. *Lowe v. Thompson*, 86 Ind. 503, 506, 507.

The original complaint was superseded by the amended complaint, and although copied in the transcript is not a part of the record, and cannot be considered. *Aydelott v. Collings*, 144 Ind. 602, 603; *Travelers Ins. Co. v. Martin*, 131 Ind. 155; *State, ex rel., v. Hay*, 88 Ind. 274. Said rejected pleading and appellant's answers to interrogatories could only be made a part of the record by a bill of exceptions, or order of court. *Carrothers v. Carrothers*, 107 Ind. 530, 532, 533, and cases cited. *Dudley v. Pigg*, 149 Ind. 363, and cases cited. The amended complaint is not copied into the record proper, but appears with the answers of appellant to the interrogatories, in the bill of exceptions, which is copied into the transcript. This bill of exceptions also contains the answers of appellant to interrogatories, the motion to reject said pleading, and the ruling and judgment of the court thereon.

Appellee insists that said amended complaint and the answers of appellant to the interrogatories propounded to her are not properly a part of the record, because, when

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said bill of exceptions was signed the same were not copied therein, nor made a part thereof by the words "here insert" as required by §638 Burns 1901, 626 R. S. 1881 and Horner 1901. On application of appellee a copy of said original bill of exceptions as it appeared when signed and filed has been certified to this court, and the same fully sustains appellee's contention.

It has been uniformly held by this court under said §638 (626), *supra*, that written instruments do not constitute a part of a bill of exceptions, unless copied into it at full length before it is signed, or are appropriately referred to and the proper place for insertion designated by the words "here insert." *Pennsylvania Co. v. Sears*, 136 Ind. 460, 474, and cases cited; *Irwin v. Smith*, 72 Ind. 482, 489, 490; Elliott's App. Proc. §818. Although the clerk has copied the amended complaint and appellant's answers to interrogatories into the bill of exceptions, it was improper for him to do so, and the same cannot be considered.

All presumptions are in favor of the correctness of the rulings of the trial court, and these presumptions continue until the contrary affirmatively appears from the record. *Close v. Pittsburgh, etc., R. Co.*, 150 Ind. 560.

As the contrary is not made to appear by the record, the judgment is affirmed.

## RINKARD v. THE STATE.

[No. 19,699. Filed December 11, 1901.]

**CRIMINAL LAW.—Indictment.—Grand Jury.**—Where an indictment, regular upon its face, is returned into open court without objection, it will, in the absence of anything to the contrary upon the record, be presumed that the grand jury returning it was duly impaneled, charged and sworn. *pp. 537-539.*

**SAME.—Indictment.—Grand Jury.—Appeal and Error.**—Objections to the organization of the grand jury, or to the regularity of the proceedings of the court in receiving an indictment, must be presented to the trial court by motion or plea in abatement, otherwise

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they will be deemed waived, and the fact that a defendant's defense was unsoundness of mind does not change the rule as to such waiver. *pp. 539, 540.*

**APPEAL AND ERROR.—Criminal Law.**—Where a defendant in a criminal cause appeals to the Supreme Court from a judgment of conviction, he must show affirmatively by the record that there was error in the proceedings of the court, and that such error was prejudicial to his substantial rights. *p. 540.*

**NEW TRIAL.—Newly Discovered Evidence.—Criminal Law.**—No error was committed in denying a motion for a new trial, on the ground of newly discovered evidence, in a prosecution for murder in which unsoundness of mind was one of the defenses, where the evidence relied upon was as to unsoundness of mind of defendant and was cumulative. *pp. 540, 541.*

**CRIMINAL LAW.—Evidence.—Weight.—Appeal and Error.**—Where, in a prosecution for murder, defendant interposed the plea of insanity, the finding of the jury that defendant was of sound mind at the time the offense was committed will not be disturbed on appeal on the evidence, on the ground that the testimony for the defendant on the issue of insanity was of an affirmative character, and that on behalf of the State was negative, and that for this reason the former only should be considered. *pp. 541-544.*

From Wabash Circuit Court; *H. B. Shively*, Judge.

John Rinkard was convicted of murder in the first degree, and appeals. *Affirmed.*

*G. W. Peterson, O. G. Allen, R. S. Peterson and J. A. Kersey*, for appellant.

*W. L. Taylor*, Attorney-General, *J. W. Murphy* and *W. M. Amsden*, for State.

**DOWLING, J.**—Indictment in the Grant Circuit Court for murder in the first degree. Plea of not guilty. On the application of the appellant the venue of the cause was changed to Wabash county. Additional plea of unsoundness of mind at the time the offense was committed. Reply in denial of plea of insanity. Trial by jury. Verdict of guilty, and that the appellant suffer death by hanging.

A reversal of the judgment is sought upon four grounds, which are alleged as follows: (1) It is not shown that the grand jury which indicted the appellant were impaneled

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and sworn; (2) it is not shown that the indictment was returned by any grand jury into open court; (3) it is not shown that the Wabash Circuit Court had jurisdiction of the cause; (4) error of the court in overruling the motion for a new trial. The indictment was returned September 8, 1900. On the same day the appellant appeared to the indictment in person, and by his attorneys, and, being arraigned, pleaded not guilty. September 12, 1900, appellant, upon affidavit, asked for a change of venue because of excitement and prejudice against him in Grant county. The motion was sustained, and the cause was sent to the Wabash Circuit Court, in Wabash county. February 5, 1901, appellant filed his special plea alleging that he was of unsound mind at the time the offense was committed, and the State filed its reply thereto. The trial began February 11, 1901, and on February 19, 1901, the jury brought in their verdict.

The record entry of the return of the indictment as corrected upon *certiorari* is as follows: "Grant Circuit Court. Sixth day of September term, 1900. No. ——. Comes now the grand jury for the term aforesaid, and present in open court the following indictment, to wit: In the Grant Circuit Court, September 8, 1900. The State of Indiana v. John Rinkard. Indictment for murder in the first degree. The grand jury of the county of Grant, in the State of Indiana, upon their oath, do present that John Rinkard, on \* \* \* at \* \* \*."

The record of the Wabash Circuit Court, to which the cause was sent, contains the following entries: "Be it remembered that on the 15th day of October the sheriff of Grant county filed in the office of the clerk of Wabash county the original indictment in the case of The State of Indiana v. John Rinkard, number 1595, which indictment is as follows: [Here follows indictment.] And be it further remembered that on said date said sheriff of said Grant county also filed in the office of the said clerk of Wabash

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county the transcript of the proceedings had in said Grant county in said cause, which transcript is in the words and figures following: [Here follows transcript.]”

It will be seen that the objections that the record did not show the return of the indictment by the grand jury of Grant county into the Grant Circuit Court, and that no legal transfer of the cause from the Grant Circuit Court to the Wabash Circuit Court appeared in the record, have been obviated by a correction of the transcript.

It is earnestly contended by counsel for appellant that the record is still essentially defective in its omission of the names of the persons composing the grand jury, and of the recital that they were duly impaneled and sworn. It is true that in some of its earlier decisions this court held that the record must affirmatively show that the grand jury was impaneled at the term the indictment was found. *Sawyer v. State*, 17 Ind. 435; *Conner v. State*, 18 Ind. 428; *Jackson v. State*, 21 Ind. 171; *Hall v. State*, 21 Ind. 268. But these cases were expressly overruled on this point by *Alley v. State*, 32 Ind. 476. There the court say: “The cases mentioned above [*Sawyer v. State*, 17 Ind. 435; *Conner v. State*, 18 Ind. 428; *Jackson v. State*, 21 Ind. 171; *Hall v. State*, 21 Ind. 268] refer to no authority whatever in support of the proposition which they announce. Nor is the reason given, viz., that a charge by authority does not otherwise appear against the accused, very satisfactory. It has an easy answer, in this, that the court below may be supposed to know its own grand jury, and that when its record declares that the grand jury returned into court as a true bill the indictment in a given case, it leaves no room for the inference that possibly the indictment was *not* found by a grand jury. It is out of our power to conceive of any reason requiring the record of each criminal case to show, at length, the impaneling of the grand jury, which would not equally require that it show the commission and oath of the prosecuting attorney who is required to sign the indictment.

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If there be a rule of the law requiring it, it must be so adjudged merely because the law requires it, and not because there is any good reason for it. We have searched the books in vain for authority or *dicta* requiring it, or practice sanctioning it, and we think it is wholly without support in the law; and it is certainly a requirement having no tendency to promote the correct administration of criminal justice. The caption to the indictment is the work of the ministerial officer, though in some of the American states it is customary to insert the facts which it should contain in the commencement of the indictment itself; and this is sufficient, but not necessary. It contains a short statement, setting forth with reasonable certainty the style of the court, and the time and place of its meeting, when and where the indictment was found; and, in England, it was usual to give the names of the grand jurors by whom it was found, and to aver that they were good and lawful men of the county, duly sworn and charged, and that they presented the indictment. But it is not necessary that it should contain the names of the grand jurors (*Rex v. Aylett*, 6 Ad. & Ell. 247), though in Lord Hale's time it was thought otherwise. 2 Hale 167. The whole subject is fully discussed by Mr. Wharton, and numerous English and American cases are referred to in the notes. 1 Am. Crim. Law (5th ed.), §§219-232. See *Wall v. State*, 23 Ind. 150; Wharton's Precedents, 2. Now, all these necessary facts are contained in the record before us, either in the caption or in the indictment itself. The law requires nothing more, and we are therefore constrained to overrule the cases alluded to, and which are in conflict with this opinion."

Again, it is said in *Holloway v. State*, 53 Ind. 554, 556: "True, it is said by appellant's counsel, that 'the record fails to show that the grand jury was impaneled, sworn and charged, and consequently that the court had no jurisdiction to put the defendant upon trial'; and again, that 'the court erred in overruling the motion in arrest of judgment

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for the same reason.' \* \* \* If it be true that the record fails to show that the grand jury was impaneled, sworn and charged, it is equally true that the record does not show that the grand jury was *not* impaneled, sworn and charged. In this case, we will presume, the contrary not appearing, that the grand jury was legally impaneled, sworn and charged. *Bell v. State*, 42 Ind. 335, and *Long v. State*, 46 Ind. 582."

On appeal in criminal causes, as in civil, all reasonable presumptions are made in favor of the regularity of the proceedings of the court, and where there is nothing in the record showing them to be invalid, they will generally be held valid. This principle has been applied in numerous cases. *Wall v. State*, 23 Ind. 150; *Kessler v. State*, 50 Ind. 229; *Beavers v. State*, 58 Ind. 530, 532; *Clare v. State*, 68 Ind. 17; *Powers v. State*, 87 Ind. 144, 146; *Walter v. State*, 105 Ind. 589; *O'Brien v. State*, 125 Ind. 38, 9 L. R. A. 323.

While some courts have maintained a different and more technical rule, the weight of modern authority, as well as sound reason, seems to sustain the proposition that where an indictment, regular upon its face, is returned into open court, and is received and acted upon by the court without objection, it will, in the absence of anything to the contrary upon the record, be presumed that the grand jury returning it was duly impaneled, charged, and sworn.

If any objections to the organization of the grand jury, or to the regularity of the proceedings of the court in receiving the indictment existed, such objections should have been presented to the trial court by motion or plea in abatement. *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; *Cooper v. State*, 120 Ind. 377; *Deitz v. State*, 123 Ind. 85. Otherwise, they must be deemed waived. The circumstance that unsoundness of mind was one of the defenses in this cause does not alter the rule as to such waiver, or relieve the appellant from its consequences.

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On appeal to this court, the appellant must show affirmatively by the record that there was error in the proceedings of the court, and that such error was prejudicial to his substantial rights. The rule in such cases is very clearly stated in *State, ex rel., v. Jamison*, 142 Ind. 679, 684: "Again, when the defendant in a criminal cause appeals from a judgment of conviction to this court, the State is relieved of the burden of the contest. In the trial court, it has the laboring oar, and the *onus* is cast upon it to convict the accused according to law, and to establish his guilt by the evidence beyond a reasonable doubt. But upon an appeal by the defendant to this court, which is merely one of error, the *status* of the parties is changed. The case comes here with all the presumptions in favor of the judgment of the lower court. We do not weigh the evidence, nor reverse upon the question of preponderance. The burden under the rule by which the appeal is controlled, is cast upon the appellant, and he is required to affirmatively show by the record the error of which he complains, and that the same was prejudicial to his substantial rights."

These rulings dispose of all questions raised by the appellant except the last: Did the court err in overruling the motion for a new trial? The points urged against the decision of the trial court upon this motion are (1) that a new trial should have been granted because of the discovery of new evidence, and (2) because the verdict was contrary to law and to the evidence.

The evidence said to have been newly discovered was to the effect that a witness living in Marion, Grant county, at the time of the homicide, had been acquainted with the appellant some ten or more years before, and while the appellant was a resident of Lima, Ohio; that this witness knew the fact that the appellant had been known at Lima as "crazy John Rinkard", and that the witness himself from his observation and knowledge of the actions and behavior of the appellant is of the opinion that the appellant was,



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when he knew him in Lima, a person of unsound mind. Proof of the fact that the appellant bore a nickname at Lima, Ohio, was inadmissible. The term applied to him may have originated from causes wholly different from unsoundness of mind. It may have resulted from some mere eccentricity of manner. It may have originated in a spirit of mischief or malice without anything in the appearance or conduct of the appellant to suggest or deserve it. The testimony of the witness concerning the actions and appearance of the appellant while at Lima, Ohio, must be regarded as cumulative, and of the same nature and to the same point as the testimony of numerous other witnesses introduced on behalf of appellant on the trial. Besides, it cannot be supposed that the introduction of this testimony would have materially influenced the verdict. Nor do we think sufficient diligence was shown in searching for evidence of this character to justify the court in setting aside the verdict, and beginning the investigation anew, for the purpose of letting in this testimony.

In the last place it is urged that the verdict is contrary to law and to the evidence. These supposed objections relate exclusively to the issue of insanity tendered by the appellant. As was said in *Keith v. State, ante*, 376, the circumstance that the appellant has been adjudged guilty of murder in the first degree, and sentenced to suffer the punishment of death, does not change the rule that on appeal this court cannot weigh the evidence. Neither can an exception to that rule be made because one of the issues in the case was the soundness or unsoundness of the mind of the appellant at the time the offense was committed. This, like every other question of fact, was peculiarly and exclusively a matter for the determination of the jury.

Counsel for appellant concede the rule as we have stated it, and assail the verdict upon the only ground available under such circumstances. They contend that there was evidence that the appellant was a person of unsound mind

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when the offense was committed, and that there was no evidence to the contrary. This proposition is conclusively disproved by the record. At the time of the homicide the appellant was about sixty years old, and his wife was ten years younger. They had been married thirty-three years; five children had been born to them; they had lived at Marion, in Grant county, Indiana, ten years. The appellant had been, at all times, as disclosed by the proof, ill-tempered, coarse, profane, and brutal in his treatment of his wife and family. Not long after his marriage to the deceased he had kicked and beaten her. He showed no natural affection for his children, and, upon slight and insufficient pretexts, whipped them severely. His cruelty of disposition extended even to his horses. His unkind behavior toward his wife continued throughout their entire married life. From the time of appellant's marriage to the deceased, until the day when he killed her, the appellant had been engaged in business. He had resided in different places, and had managed his own affairs. He was industrious, close in his dealings, somewhat eccentric in manner and speech, and always disagreeable and overbearing, particularly to those in any degree dependent upon him. A short time previous to the homicide, the wife of the appellant went to Ohio to attend the funeral of her mother. When she came back to Marion, she did not return to the appellant, but took up her residence with her brother. Between 10 and 11 o'clock on the morning of June 9, 1900, the appellant went to the house where his wife was staying, and found her ironing in the kitchen near an open window. He fired through the window, shooting her through the hand. He rushed into the house and seized her. She struggled with him, and, with her head upon his breast, begged him not to kill her. He answered her with a curse, and shot her three times more, two bullets passing through her chest, and one of them penetrating her heart. She died instantly. The appellant then fired a bullet into his own head, inflict-

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ing a serious wound, from which, however, he soon recovered. After the homicide, he was found resting partly upon a bed in the room where he had killed his wife, with two revolvers under him. All the chambers of one revolver were empty; two chambers of the other had been discharged.

The fact of the homicide by the appellant was not denied on the trial. The defense was insanity. Many witnesses, expert and non-expert, were examined on behalf of the appellant to sustain his plea of unsoundness of mind. Much of this testimony tended to prove that the appellant was insane. On the other hand, the State introduced a large number of witnesses, expert and non-expert, who testified to facts, and expressed opinions, proving, and strongly tending to prove, that the appellant was of sound mind. The argument of counsel for appellant that the testimony for the appellant was of an affirmative character; that the proof for the State was negative; and that, for this reason, the former only should be considered, is utterly unsound. The evidence for the State was competent and material, and was such as must always be produced by a party who denies the insanity of the person whose mental condition is the subject of inquiry. If the rule were as stated by counsel for appellant, it would be impossible in any case for the State to meet the proof of a defendant, alleged to have been insane, or to produce evidence of sanity. Other things being equal, testimony proving, or tending to prove, sanity is entitled to as much respect as testimony of the same kind proving, or tending to prove, insanity. There was, as we have said, evidence, and much of it, from which the jury were authorized to find that the appellant, at the time the offense was committed, was a person of sound mind. This being true, we can proceed no further. The question of the weight and value of the evidence, and the credibility of the witnesses, was exclusively for the jury. Upon that evidence, conflicting and irreconcilable perhaps, they decided against the appellant. The responsibility for a just and correct deci-

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sion upon the evidence was with them; by their decision this court is bound; and upon a searching and thorough examination of the whole record, we are convinced that they were fully justified in their conclusions of the sanity of the appellant, and of his guilt of the crime charged against him in the indictment.

Judgment affirmed.

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CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY  
COMPANY v. BROWN.

[No. 19,227. Filed May 7, 1901. Rehearing denied Dec. 11, 1901.]

**APPEAL AND ERROR.—Trial.—Examination of Witness.—Correction of Discrepancy in Testimony.—Harmless Error.**—Where, in the trial of an action against a railroad company for damages to property caused by fire escaping from defendant's right of way, it appeared that plaintiff owned land in seven different sections that were burned over, the refusal of the court to permit counsel for defendant to ask a witness on cross-examination "Do you say it makes a difference of \$3 an acre in fifteen minutes, in the price?"—witness having testified in his examination in chief that land in a certain section was worth \$6 or \$7 an acre before the fire, and on cross-examination that it was worth \$5 an acre, was harmless, where it was shown by a subsequent answer that witness was at the time mistaken as to the section. *pp. 546, 547.*

**SAME.—Misconduct of Court.—Exception.—Trial.**—No question is presented on the alleged misconduct of the court in stating during the examination of a witness "I can't permit that; treat the witness fairly", where the exception was taken to the rejection of the question, and no exception was taken to the remarks of the court, nor the alleged misconduct specified as a ground for a new trial. *p. 546.*

**TRIAL.—Evidence.—Harmless Error.**—Error in refusing to allow a witness to answer a question in a certain form is cured by a subsequent question propounded by the complaining party which elicited an answer that responded fully to the rejected question. *pp. 546, 547.*

**EVIDENCE.—Opinion of Witness.—Railroads.—Fires.**—An objection to the opinion of a witness as to the value of land after the fire, in an action against a railroad company for damages caused by fire escaping from its right of way, on the ground that he had been upon only a small portion of the land after the fire, was properly overruled, where the witness was well acquainted with the nature and value

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of the land, and had given, without objection, his opinion of the value before the fire, since the objection went rather to the weight than to the competency of the testimony. *p. 547.*

**RAILROADS.—Fires.—Damage to Land.—Instruction.—Measure of Damages.**—No error was committed in instructing the jury in an action against a railroad company for damages to land caused by fire escaping from defendant's right of way, that the measure of damages was the difference, if any, between the market value of the land burned over, immediately before the fire, and its fair market value immediately afterward, where no other cause for depreciation was suggested by defendant in the trial of the cause. *pp. 547, 548.*

**SAME.—Fires.—Damage to Personal Property.**—An instruction in an action against a railroad company for damages to property caused by fire escaping from the right of way, that the measure of damages was its fair market value at the time of its damage or destruction, was erroneous in respect to personal property that was injured only, and not totally consumed. *pp. 548, 549.*

**APPEAL AND ERROR.—Remittitur.**—Where, in an action against a railroad company for damages to land and personal property, caused by fire escaping from the right of way, the court erred in instructing the jury as to the measure of damages to personal property that was injured and not totally destroyed, and the damage assessed because of such erroneous instruction is ascertainable from the record, and the remainder of the verdict and judgment was not, and could not have been affected by the instruction, and is right, the court will permit the plaintiff to cure the error by remittitur. *p. 549.*

From Jasper Circuit Court; *R. S. Dwiggin*, Special Judge.

Action by William B. Brown against the Chicago, Indianapolis and Louisville Railway Company for damages to plaintiff's property caused by fire escaping from defendant's right of way. From a judgment for plaintiff, defendant appeals. *Affirmed conditionally.*

*E. C. Field, W. S. Kinnan and J. B. Peterson*, for appellant.

*Wm. Johnston and J. W. Youche*, for appellee.

**BAKER, J.**—Appellee recovered a judgment for \$10,000 for damages to his property caused by appellant's negli-

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gently permitting fire to escape from its right of way. The only error assigned is the refusal of a new trial.

Appellant was not allowed to ask appellee's witness Stowell on cross-examination the following question: "Do you say it makes a difference of \$2 an acre in fifteen minutes in the price?" Appellee owned lands in seven different sections that were burned over, and the witness on direct examination had testified as to the values of the various parcels before and after the fire. Appellant was taking the witness over the same ground, and the excluded question appears in the following connection: "Q. Now take the land in section eighteen, what was that worth before the fire? A. About \$5. Q. About \$5? You told Mr. Youche (on direct examination) it was worth six or seven, didn't you? A. I don't know. Q. You don't know? A. No, sir. Q. Do you say it makes a difference of \$2 an acre in fifteen minutes in the price (in the time since you testified on direct examination)? The court: I can't permit that. \* \* \* Treat the witness fairly." If there was any doubt as to the propriety of the court's action, and if that doubt could be magnified into an abuse of discretion in controlling the cross-examination, the error would be harmless, for, after the witness's attention had been called to the relative locations of various sections, the cross-examination was allowed to proceed thus: "Q. Now how does it come that you made this difference in your estimate of \$2 an acre? A. Well, I was mistaken in the section. Q. Made a mistake in the section? When did you make the mistake, before or now? A. Just now. Q. Just now? A. Yes sir, I was thinking of another section." Appellant claims to have been injured by the remarks made by the court in excluding the foregoing question. The exception was taken to the rejection of the question. No exception was taken to the remarks of the court, nor was the alleged misconduct specified as one of the grounds for a new trial.

The following question was also propounded to the wit-

ness Stowell on cross-examination: "You answered Mr. Youche a minute ago eight, didn't you?" And the court interposed: "Ask him what he did answer." Appellant excepted to the rejection of the question, but immediately proceeded: "Q. Do you remember what you told Mr. Youche the value of section fourteen was after the fire? A. I told him seven or eight [dollars per acre]." By the second question appellant elicited an answer that responded fully to the rejected question.

Appellee's witness Dinwiddie was asked on direct examination: "Take that same land after the fire, what was it worth after it was burned?" Appellant objected to the witness's being permitted to answer on the ground that he had not shown himself qualified to speak on that subject. The witness had stated that he had lived since 1853 on lands adjoining appellee's, was well acquainted with the nature and value of lands in the neighborhood, including appellee's, and had given without objection his opinion of the value before the fire. The objection to his giving his opinion of the value of appellee's lands after the fire is based upon his testimony that he had only been upon a small portion of them since they were burned. The witness had stated that he had observed how appellee's lands were burned, and that he had had experience with lands of the same kind that had been similarly burned, and knew their value. Although the extent to which the witness had been upon appellee's lands after the fire was limited, there was no limitation in his answer as to his observations. But even if his observations were limited, the objection went rather to the weight than to the competence of his testimony.

The court gave this instruction: "The rule for the measure of damages, if there is a right of recovery, is the difference, if any, between the fair market value of the land burned over, belonging to the plaintiff, immediately before the fire and its fair market value immediately afterwards." Counsel are correct in saying that appellant should pay

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only for the direct consequences of its wrongful act, and should not be held liable for the depreciation in the value of the land, while the fire was in progress, resulting from the collapse of a real estate boom or other intervening causes. In the following cases, however, it has been held that the measure of damages is the difference in values of the land immediately before and after the fire: *Chicago, etc., R. Co. v. Smith*, 6 Ind. App. 262; *Chicago, etc., R. Co. v. Kern*, 9 Ind. App. 505; *Terre Haute, etc., R. Co. v. Walsh*, 11 Ind. App. 13; *Louisville, etc., R. Co. v. Sparks*, 12 Ind. App. 410; *Baltimore, etc., R. Co. v. Countryman*, 16 Ind. App. 139; *Louisville, etc., R. Co. v. Spencer*, 149 Ill. 97, 36 N. E. 91; *Hayes v. Chicago, etc., R. Co.*, 45 Minn. 17, 47 N. W. 260; *Ward v. Chicago, etc., R. Co.*, 61 Minn. 449, 63 N. W. 1104; *Dwight v. Elmira, etc., R. Co.*, 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612; *Ft. Worth, etc., R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365. And in the majority of them the decisions involved an approval of instructions in which the rule was stated as above, without qualification. We entertain no doubt but that every one of those courts would have added a qualification that would have excluded all intervening causes, if any such had appeared in the case. But when a plaintiff proves that the defendant has negligently injured his property by fire—a sufficient cause for depreciation in value—and when the defendant contests the extent of the depreciation without suggesting that there was any other cause, the trial court should not be criticised for treating the case as the parties treated it, or for failing to state to the jury the legal effect of circumstances which the defendant does not claim existed. To quote from *Baltimore, etc., R. Co. v. Countryman*, *supra*: “Had it appeared that some other factor had intervened during the fire to affect the value of the land, then, doubtless, such factor should have been expressly excluded; but our attention has not been called to the existence of anything of this kind.”

In regard to the personal property, the court charged:



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“And as to the other property injured or consumed, if any, the measure of damages is its fair market value at the time of the damage or destruction.” This instruction was erroneous in respect to personal property that was injured only and not totally consumed. It is manifest, however, that the error could have had no influence upon the damages awarded for injury to the land or for destruction of personality. The undisputed evidence shows that all the personality was completely consumed except one hay-press, and that the fair market value of this was \$250 immediately before it was injured by the fire and \$200 immediately afterwards. From the whole record, it is demonstrated with certainty that the error was prejudicial to the extent of \$200 only, and that \$9,800 of the verdict and judgment was not, and could not have been, affected by the instruction complained of. If the error had been harmless, the judgment as rendered ought to be affirmed; and, although the error was injurious, this court should permit appellee to cure the injury at his expense, since the utmost extent thereof is known. *Frazer v. Boss*, 66 Ind. 1; *Hayden v. Florence Sewing Mach. Co.*, 54 N. Y. 221.

It is ordered that the judgment, as to \$9,800, be affirmed at appellee's costs, if within thirty days he shall enter a remittitur for \$200 as of the date of the judgment; otherwise, it is ordered that the judgment be reversed and a new trial granted.

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DIEHL v. THE STATE.

[No. 19,658. Filed December 12, 1901.]

**CRIMINAL LAW.—Affidavit and Information.—Abortion.—Separate Counts Charging Inconsistent Means.** — Under §1818 Burns 1901, providing the felony or misdemeanor may be charged in separate counts in the indictment or information to have been committed by different means, the State may, by separate counts or paragraphs, not only in the information, but also in the affidavit on which the information rests, in a prosecution under §1996 Burns 1901, for producing an abortion resulting in the woman's death,

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charge the offense to have been committed by the accused by different means or in different ways. *pp. 550-554.*

**CRIMINAL LAW.—Evidence.—Res Gestae.—Abortion.**—Where, in a prosecution for abortion, causing the death of the woman, a witness for the State testified to a part of a conversation overheard by her, between defendant and deceased, after the abortion was committed, the defendant was entitled to give the entire conversation for the purpose of rebutting and explaining the portion introduced by the State. *pp. 554-569.*

**EVIDENCE.—Conversation.**—It is error to permit a witness to testify as to his mere understanding obtained from a conversation, instead of relating the conversation. *pp. 569-571.*

**APPEAL AND ERROR.—Instructions.—Record.**—Available error cannot be predicated upon the action of the court in refusing an instruction offered by appellant where all of the instructions are not in the record. *pp. 571, 572.*

**ABORTION.—Necessity.—Evidence.**—In a prosecution under §1996 Burns 1901, for abortion, the absence of necessity of producing the abortion in order to save the life of the woman may be shown by circumstantial evidence. *p. 572.*

From Henry Circuit Court; *E. H. Bundy*, Judge.

John H. Diehl was convicted of abortion, and appeals.  
*Reversed.*

*T. Bagot, A. Ellison, C. K. Bagot, W. A. Kittinger, W. S. Diven, R. S. Gregory, W. Ball and W. A. Brown*, for appellant.

*W. L. Taylor*, Attorney-General, *C. C. Hadley* and *Merrill Moores*, for State.

**JORDAN, C. J.**—John H. Diehl, appellant in this appeal, together with Garrett D. Leach and Frank F. Diehl, was charged by affidavit and information with having committed on the person of Mary Farwig, at the county of Delaware and State of Indiana, the felonious crime of abortion. On November 7, 1899, the State filed in the Delaware Circuit Court an affidavit and information each of which contained three separate counts or paragraphs. Subsequently the State filed what is denominated a supplemental affidavit and information each embracing four additional counts. On the motion of appellant he was granted a separate trial, and on

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his application the cause was venued to the Henry Circuit Court. His motion to quash the affidavit and information and each count thereof was denied, to which he excepted, and thereupon entered his plea of not guilty. On the issues joined under this plea, the cause was submitted to a jury, who returned a verdict of guilty as charged, and that the age of appellant was thirty-six years. Over his motion for a new trial the court adjudged that he be imprisoned in the state prison for an indeterminate period of from three to fourteen years. From this judgment he appeals, and relies for a reversal thereof on the alleged errors of the trial court in denying his motion to quash the affidavit and information and each count thereof, and in overruling his motion for a new trial.

The prosecution is based on §1996 Burns 1901, §1923 Horner 1897, which reads as follows: "Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine, or substance whatever, with intent thereby to procure the miscarriage of such woman; or, with like intent, uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be fined not more than \$500 nor less than \$50, and imprisoned in the state prison not more than fourteen years nor less than three years."

The affidavit and information, including that which is supplemental thereto, each consists of seven separate counts. Appellant's learned counsel contend that inasmuch as there is no express authority for an affidavit in a criminal cause to contain separate counts or paragraphs, such pleading, therefore, must be viewed and considered as a whole, and not in respect to its separate counts, and they assert that when the affidavit in question is so viewed and considered it becomes manifest that its several charges are so repugnant, self-contradictory, and antagonistic, that they destroy each other and thereby fail to show that appellant is guilty of any

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public offense whatever. All of the counts in the affidavit are verified by the oath of one Samuel Cashmore. In some of them it is charged that the miscarriage in controversy was produced by appellant and his codefendants by administering to one Mary Farwig a certain drug and medicine. In others it is charged that the abortion which resulted in the death of this woman was accomplished by means of and by the use of a certain instrument called a "catheter." In others it is alleged that the instrument employed by appellant and his associates is unknown to affiant. While another count alleges that the miscarriage in question was procured by the administration and use of a certain instrument and substance unknown to the affiant. From an inspection of the affidavit and information it appears that the State was careful to charge therein by different counts the procurement of the miscarriage by the administration of different medicines or substances, and by the employment of different instruments, etc., in order to be prepared to meet any varying evidence in the case. Counsel assert that a grand jury may present by different counts in an indictment the various phases or means by which an offense is committed, but contend that this practice is not authorized or applicable when the prosecution is instituted through an affidavit and information. In other words, the insistence seems to be that the State in an affidavit cannot be permitted by using the conjunction "and" instead of "or," as used in the statute, to charge the prohibited act in question to have been accomplished by the administration of some certain drug, medicine, or other substance, or by the use of differently named instruments. In the appeal of *Rosenbarger v. State*, 154 Ind. 425, we held that the State in a prosecution under the statute which makes it an offense to administer, or procure to be administered, any poison, etc., might, in a single count of the indictment, by using the conjunction "and", charge the accused with having offended against the statute by alleging its violation by the means of as many of the pro-

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hibited acts as might be deemed necessary to render the pleading applicable to the evidence, without making it open to the objection that it is bad on account of duplicity, uncertainty, or that it is contradictory.

The case of *Deveny v. State*, 47 Ind. 208, was a prosecution for a misdemeanor commenced before a justice of the peace. This court in the latter case said: "There is no such thing as different counts in an affidavit. If the two offenses could be included in one indictment of two counts, we perceive no reason why they may not be in one affidavit and prosecution before a justice of the peace, and tried together."

*Stoner v. State*, 80 Ind. 89, was a prosecution on affidavit and information for the unlawful selling of intoxicating liquor. The information contained two counts based on separate affidavits, each of which charged differently the same offense. On reviewing a motion to quash the affidavit and information in that case, Niblack, J., said: "The court, as well as the parties, appears to have treated both the affidavits as the first and second counts of one and the same affidavit, and the appellant's motion was to quash the 'affidavit and information,' evidently referring to both affidavits as constituting one judicial instrument, or an integral part of a pleading. No objection is urged to the sufficiency of what was treated as the second count of the affidavit. We, therefore, assume that no reason existed for questioning its validity, and that as to it the motion to quash was correctly overruled. The second count being sufficient, there was no error in refusing to quash the affidavit as a whole, and no separate motion to quash the first count having been made, no question is now presented upon its sufficiency."

Our criminal code, §1813 Burns 1901, §1744 Horner 1897, provides that "The felony or misdemeanor may be charged in separate counts in the indictment or information to have been committed by different means." Under this section, where the State, as in the case at bar, institutes

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the prosecution by affidavit and information it may, by separate counts or paragraphs, not only in the information, but also in the affidavit on which the information rests, charge the offense in question to have been committed by the accused by different means or in different ways. Under such circumstances, each count of the affidavit would be nothing more than a separate affidavit, and the several counts considered together as integral parts would constitute one particular pleading, and like each paragraph or count of an indictment or information must be sufficient within itself in respect to the offense sought therein to be charged against the accused person. Under such circumstances, in order to render all of the several counts of the affidavit available to the State on the trial, the information filed in the case must, by separate counts, substantially correspond to or cover each count of the affidavit. Any or all counts which the information did not apply to, or embrace, would, on the trial, certainly be of no avail. Because the facts alleged in each count of the affidavit must be verified by the oath of some person does not necessarily require that the means charged in one count by which the crime was committed must be consistent with those alleged in another separate count or paragraph of the same pleading. The State being authorized, under separate counts, both in the affidavit and information, to charge the commission of the offense in controversy to have been committed by various and inconsistent means, we, therefore, conclude that appellant's objections cannot be sustained, and the motion, therefore, to quash the affidavit and information and each count thereof, was properly overruled.

Among the several questions presented for review in this appeal, we are urged to consider the evidence which counsel for appellant contend is not sufficient to support the judgment. As it will be necessary for us to refer to the evidence in respect to some of the court's rulings to be reviewed, we deem it proper at this point in our opinion to set out a

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synopsis or outline of the evidence given on the trial of the cause as it appears in the record. The following, therefore, may be said to be a synopsis thereof as introduced on behalf of the State: Mary Farwig, upon whom the abortion is charged to have been committed, was twenty-eight years old. About three years and over prior to October 25, 1899, she was employed as a housemaid or domestic at the home of the family of appellant's father, Philip Diehl, at the city of Anderson, Indiana. Her home was at Richmond, Indiana, and the family of the said Philip Diehl, aside from himself, consisted of his wife, and a brother and sister of appellant, and two grandchildren of the said Philip Diehl. For some time prior to October 25, 1899, Miss Farwig had been complaining in regard to her health, but in the main she was enjoying ordinary health. On said 25th day of October, she left the home of appellant's father at Anderson to go to the city of Indianapolis, for the alleged purpose of visiting some relatives. This, so far as the evidence discloses, is the last seen of her until the 26th day of October, 1899, when she appears to have registered at the Braun Hotel in the city of Muncie, Delaware county, Indiana. She remained at this hotel for two days, and on the afternoon of October 27th she went out for a walk with some person not identified by the evidence. On the evening of the same day, a woman, not expressly identified by the evidence, was taken by a hack driver in company with a person named Dennis O'Mera, and along with some other person whom the hack driver believed to be appellant, but he did not recognize appellant as the particular person in question. These passengers were taken in the carriage by this driver to a certain street crossing in the city of Muncie, which crossing was within two squares or blocks of the residence of Dr. Garrett D. Leach, a codefendant of appellant in this prosecution. On the afternoon of October 25th and on the afternoon of the day following appellant went by rail to the city of Muncie. On the morning of October 28th Miss Farwig paid her bill at

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the hotel where she had been stopping in Muncie, and left the house, and was not thereafter at said hotel. The next that is disclosed in regard to her is that on the 31st day of October following she was at the residence of said Dr. Leach in Muncie, and Leach called in consultation Dr. Bowles, a prominent physician of Muncie, who, together with Dr. Leach, made, at the residence of the latter, an examination of Miss Farwig, and discovered that she was suffering from the results of a miscarriage. From this time forward it is disclosed that she was visited and treated at the residence of Leach by Doctors Bowles, Green, and Quick, all of whom were prominent physicians of the city of Muncie. This treatment it appears continued until Miss Farwig died on the morning of November 4, 1899, at the city of Muncie, Delaware county, Indiana, from septic fever or blood poison. From an examination made by the physicians on October 31st, it appears that the miscarriage or abortion in question must have occurred from ten to twelve days prior to the aforesaid 31st day of October. On one or two evenings about the middle of the week ending on Saturday, November 4th, the day of her death, appellant, as disclosed, rode on a street car in the city of Muncie to the street crossing nearest to the residence of Dr. Leach, and inquired at the time of the conductor in charge of the car, about where the home or residence of Leach was located. Leach, as it appears, met appellant, and he and the former started in the direction of the doctor's home. On the afternoon of November 3rd, the day preceding the death of Miss Farwig, Dennis O'Mera requested a young man who was intending to go to the city of Anderson to carry a sealed letter or note to Frank F. Diehl, appellant's brother and codefendant herein. The young man in question it seems carried the note to Anderson, but not being able to find Frank F. Diehl, delivered the note or letter to appellant. About 8 o'clock on the night of November 3rd, appellant went to the residence of Dr. Leach at Muncie to see Miss Farwig and was admitted to the room



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where she was confined to her bed. Mrs. Anna McCusker, the nurse who was engaged in taking care of Miss Farwig, was in the room at the time, and she, as a witness for the State, testified on the trial that when appellant was admitted to the room he went to the bed where Miss Farwig was lying and greeted her in an affectionate manner with a kiss, and inquired about her condition. Miss Farwig, as disclosed by this witness, said to him that she was going to die, to which appellant responded: "Mary you must live for my sake." That thereupon appellant requested that the nurse, Mrs. McCusker, should leave the room. With this request she seems to have complied, and after she had left the room and had got into the hall she heard appellant and Miss Farwig in conversation in which the latter said to him: "John, we must tell the truth", and that appellant then said to Miss Farwig: "You listen to me. You listen to me." That she heard no more of the conversation that took place between these parties. She testified that she remained out of the room about fifteen minutes, and then returned, and that appellant again requested her to leave the room, which she did. The State also introduced evidence showing that Miss Farwig had stated to Dr. Leach that she was a Mrs. Williams, and represented that she was a married woman. It is also disclosed that appellant when he came to Dr. Leach's stated that his name was Williams, and that he and Miss Farwig were husband and wife. Subsequently, however, it appears he revealed his true name and exhibited his business card which disclosed his name and his residence and the business in which he was engaged. On the evening when appellant visited Miss Farwig at the residence of Dr. Leach, after learning of her serious condition and illness, he called upon Doctors Green and Bowles, who had been previously treating her, and requested them to visit her again and do whatever they could for her. The evidence further discloses that appellant on November 3rd, the time when he visited Miss Farwig as previously mentioned, remained at

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the doctor's all night, and left for his home at Anderson the next morning before Miss Farwig died; her death occurring about 8 o'clock a. m. The evidence introduced in behalf of appellant also shows that Mary Farwig, the deceased, had resided in the home of the Diehl's in Anderson over three years, that she was well treated and highly regarded by the family. For several months before she left the home of appellant's father, on October 25th, she had complained of being afflicted with leucorrhea and other diseases peculiar to women, and had been in delicate health, and had made preparation to visit for a week or more some of her relatives at the city of Indianapolis, after which she intended to go to her home at the city of Richmond and rest for a period of time, and then if appellant's family desired her services again she would return to Anderson. It appears that appellant and his family believed that when Miss Farwig left the home of his father, on October 25th, that she had gone to Indianapolis, and were not advised to the contrary until on the afternoon of November 3rd, when appellant's brother, Frank F. Diehl, received a letter or note from Muncie. This letter or note was carried from Muncie to Anderson, and the carrier left it with appellant at his place of business to be delivered to his brother Frank, who it seems was absent at the time at some place in the city of Anderson. By this note, Frank F. Diehl was advised of the serious condition of Miss Farwig; that she was lying sick at the residence of Dr. Leach at Muncie. Frank, it seems, informed his mother of this fact, and the latter informed appellant. The family, it appears, held a consultation in respect to who should go to Muncie to ascertain what was the trouble with Miss Farwig, and to learn what, if anything, could be done for her. It was then suggested that the mother, Mrs. Diehl, should go, but she, being in feeble health and thereby unable to go, requested appellant to go to Muncie in her place. With this request he seems to have complied, and on the afternoon of November 3rd he

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went to the city of Muncie, and, guided by the information contained in the letter to his brother Frank, he went to the home of Dr. Leach, where he found Miss Farwig very seriously sick. It is disclosed that he did all that he could to secure for her the necessary medical attention until he was advised by the attending physicians that her condition or illness would necessarily prove fatal. It further appears that neither appellant nor any of the members of the family knew anything in regard to the condition of Miss Farwig when she left Anderson on October 25th, aside from the fact that she was in ill health, as previously mentioned. Appellant at the trial as a witness denied that there was any guilty or immoral intimacy at any time existing between him and Miss Farwig. He testified that he knew nothing of any abortion or miscarriage by her, and that he neither procured nor had any connection whatever in procuring the miscarriage in controversy. The first knowledge which he had of her being at Muncie was when he was advised of that fact by his mother on November 3rd. That on the previous occasion, when it appeared that he was in Muncie, he was there for the purpose of consulting with a Mr. Glass, a contractor, in regard to the removal of appellant's factory from the city of Anderson. He denied that he stated that he was the husband of Miss Farwig, and also denied all of the facts disclosed by the State's evidence which had any bearing on the question of his guilt, but we do not deem it essential to give all of these facts and the denial thereof by appellant in detail.

Appellant's learned counsel specially argue and urge with much force two errors alleged to have been committed by the trial court. The first relates to the court's excluding certain evidence offered by appellant; the second, in admitting certain evidence on behalf of the State. As previously shown in the summary of the evidence set forth a Mrs. McCusker was introduced by the State as a witness in its behalf. She testified that she was present, as a nurse attending Mary

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Farwig at the residence of Dr. Leach, on November 3, 1899, on the occasion that appellant called to see Miss Farwig. This witness also testified that on the night of that day, about 8 o'clock, appellant came to the residence of Dr. Leach, in Muncie, and was admitted to the room where Miss Farwig was confined to her bed, and that after greeting her as previously stated, the girl said to him that she was going to die, to which appellant responded that she must live for his sake. That thereupon he requested the witness to leave the room and in pursuance of such request she retired from the room, leaving him and the girl alone therein, and that they engaged in a conversation. The witness then testified that after she had left the room she overheard a part of this conversation; that she heard Miss Farwig say to appellant: "John, we must tell the truth", and that he then said to the girl in response to this, "You listen to me. You listen to me." We quote from the record the questions propounded to the witness, Mrs. McCusker, by the attorney for the State, and her answers thereto in respect to her leaving the room and the part of the conversation which she heard after she had retired. "Q. You may state whether or not you went out of the room? A. I did. Q. Did you hear any statement or conversation between him and the woman after you went out? A. Yes, sir. Q. State what you heard? A. Miss Farwig said, 'John, we must tell the truth,' and he said 'You listen to me. You listen to me.' Q. Did you hear any more of the conversation? A. No, sir, I did not. Q. What did you do? Did you close the door? A. I did. Q. How long did you remain out of the room? A. Fifteen minutes. Q. Then did you go back? A. I went back to give her some medicine. Q. You may state what occurred, if anything, when you went back. A. I went back, and he asked me to go out of the room again. Q. What did you do? A. I said 'certainly', and went out. Q. Did you hear anything at that time? A. No, sir."

When appellant was on the witness stand testifying in his

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own behalf, his counsel endeavored to have him state what was said between him and Miss Farwig at the time and in the same conversation to which Mrs. McCusker had testified, and all that was said in that conversation after she had left the room. The first question propounded by counsel to appellant in respect to this conversation is as follows: "Q. State all that was said between Mary Farwig and yourself upon that occasion on that evening, in the room there at the time Mrs. McCusker, the witness who testified here in this case yesterday, on behalf of the State, was present, and all that was said at the time she was absent from the room, between you and deceased, Mary Farwig, in the same conversation that was entered upon before she left the room, if any was entered upon, and if any conversation was had?"

To the evidence sought to be elicited by this interrogation the State objected on the ground that appellant must be limited in testifying to that portion of the conversation testified to by Mrs. McCusker, and that he was not entitled to give what was said in the conversation between himself and Miss Farwig after Mrs. McCusker had left the room. Counsel for appellant then offered to prove by him in answer to the question propounded, the following: "That the deceased, Mary Farwig, invited the witness, Mrs. McCusker, to leave the room; that she left the room; that when she left the room the defendant asked the deceased what had gotten her into the condition she was then in, and how it happened, and how she came to the place where she was; that he had understood that the deceased had been to Indianapolis, visiting with her cousins there; that the deceased thereupon answered him, the defendant, that she did go to Indianapolis, but that she would never tell who it was that had gotten her into the condition in which she then was; that it had been done at Indianapolis, and that no one would ever know who had done it except herself and the doctor; that the de-

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fendant there asked the deceased to tell all about it, and that she said in reply, no, that she never would tell them; that the defendant thereupon said to the deceased 'Well then, you want your mother here; you are in a very serious condition,' and that the deceased then said to the defendant 'No, I do not want my mother; I beg of you not to have my mother come', and that this was all of the conversation that occurred or was had in the absence of the witness, Mrs. McCusker, between the defendant and the deceased, upon the occasion inquired about."

The court sustained the objection of the State and held, in effect, that appellant might testify in regard to that portion of the conversation heard by and testified to by Mrs. McCusker, but that he was not entitled to give in evidence any part thereof which took place after she left the room, and about which she did not testify, and would not permit the evidence offered to be given to the jury, to which ruling of the court appellant duly excepted.

After the court had excluded the proposed evidence, other questions were propounded to appellant whereby he was asked if, during the conversation in question, Mrs. McCusker left the room, and he answered that she did, and was then asked to give the conversation between him and Miss Farwig, if any occurred after Mrs. McCusker had left the room at the time referred to by her in her testimony given on behalf of the State. To each of these questions the State objected on the grounds heretofore stated, and thereupon appellant offered to prove the conversation in question which he had with the deceased, and that all that he had with her was as stated in the aforesaid offer, each time setting it out in full. The court denied each of these offers to prove and would not permit the evidence proposed to be given, and appellant each time duly excepted. In fact the record discloses that the question by which the residue of the conversation in controversy was sought to be given in evidence was put to the witness in various forms. The several

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questions as propounded and the offers made must have fully disclosed to the trial court that appellant desired to give to the jury the entire conversation had with the deceased at the time and upon the occasion testified to by Mrs. McCusker. If the remainder of the conversation in question, other than the detached portion detailed by the State's witness, was competent to be given in evidence for any purpose on behalf of appellant, it should have been admitted, for there is no more familiar rule of the law of evidence than that which affirms that if the evidence proposed to be introduced by a party in an action is relevant and admissible for any purpose, it must be received, and the court should advise or instruct the jury in regard to the purpose for which it is admitted, and confine them in its application to that particular purpose.

We may next inquire in respect to the limitation imposed by the trial court upon appellant to which he was confined in giving his version of the conversation in question. Counsel for appellant insist that the State by showing that the accused had a private conversation with the woman upon whom he was charged with having perpetrated the crime in dispute, and with whom the State also sought to show that he had entertained immoral and intimate relations, thereby sought to prove a guilty conversation or a guilty act, and by giving in evidence the part of the conversation which it did, that it endeavored thereby to show incriminating declarations upon the part of the accused; that by the court's ruling to the effect that he was not entitled to detail the part of the same conversation which occurred after the witness for the State had retired from the room, and about which she did not testify, that thereby he was deprived of an important right; or in other words it is contended that inasmuch as the State opened the door to a part of the conversation in question, that thereby appellant was entitled to the entire conversation for the purpose of explaining and rebutting the portion introduced by the State.

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The rule is well settled that where a witness in a cause gives or details a conversation in part, the party against whom it is introduced as evidence is entitled to the whole conversation, at least so far as it may materially tend to impeach, rebut, explain, or qualify the portion introduced by his adversary. This rule is well affirmed by the decisions of this court, and other authorities. *Metzer v. State*, 39 Ind. 596; *Harness v. State, ex rel.*, 57 Ind. 1; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *Carey v. City of Richmond*, 92 Ind. 259; *Comfort v. People*, 54 Ill. 404; *Phares v. Barber*, 61 Ill. 271; *Barbour v. Martin*, 62 Me. 536; *Frank v. State*, 27 Ala. 37; Jones on Ev. §§168, 822, 874, 875, and authorities cited in footnotes 2 and 3 in support of §822; Greenleaf on Ev. (16th ed.), §§201, 462b.

*Metzer v. State, supra*, was a prosecution for larceny. The State introduced a portion of a conversation which occurred between the accused and another person, in relation to the coat which was the subject of the larceny. The accused sought to call out from the witness the entire conversation, of which the State had given a portion. This the court denied, and its ruling in this respect on appeal was held by this court to be error. In considering the question, Downey, J., said: "It is a general rule that when part of a conversation, admission, or confession has been given in evidence against a party, he may, on a cross-examination, or by fresh evidence from his own witnesses, prove the residue of the same conversation, admission, or confession, so far as it relates to the same transaction. \* \* \* Those parts of a conversation or confession which are against a party cannot be given in evidence, without opening the door for those parts which are favorable to him, and they may be called out by a cross-examination of the same witness by whom the unfavorable parts have been narrated." Citing authorities.

*Barbour v. Martin*, 62 Me. 536, *supra*, was an action against a physician for damages on account of the death of a



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woman due to the malpractice of the defendant in a case of obstetrics. The defendant introduced a Mrs. Graffam as a witness in his behalf to prove a certain conversation which she heard between the deceased wife and her husband. This witness stated when the deceased became worse that her husband went for the doctor, and that the wife said in the conversation that "she would rather have Dr. Martin because she had him once." The witness then stated that she had heard nothing said in the conversation about Dr. Martin "being away", and gave her reason for not hearing all of the conversation, as follows: "I was not in the room much, for I had the little girl to take care of." The plaintiff then called the husband of the deceased wife and proposed to prove by him the whole conversation that occurred on the occasion in question. The trial court excluded so much of the conversation proposed by defendant as occurred when the witness, Mrs. Graffam, was absent from the room. This ruling was held to be error. The court in reviewing the question as presented in that appeal said: "The remaining part of the conversation, as testified to by the husband, very materially modifies what had been previously said, or unsaid. The plaintiff was therefore entitled to it, even though it might be proved by another witness. The fact that one witness may not have heard all the conversation, or may have forgotten a portion of what he did hear, does not deprive the party of his right to the whole, if the whole can be proved. When a part or all of a conversation has been proved, we are not aware of any principle of law that will prevent any number of witnesses who may have heard it, from giving each his own recollection of it. It is sufficient that it is the same conversation, and relates to the same subject-matter."

*Frank v. State*, 27 Ala. 37, was a prosecution for murder. The State introduced a Mr. Bruton who testified in its behalf that the accused in a conversation with him made certain admissions and statements concerning the commission

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of the crime. The defendant offered to prove that immediately after Bruton left, and in his absence, that he continued the conversation with another person to whom he gave a full and fair statement about the fight in which the fatal injuries were inflicted upon the deceased, stating in such conversation so continued the manner in which the fight had been brought about, and the manner in which the deceased had been wounded. This latter part of the conversation the witness Bruton did not hear. This proposed evidence the trial court rejected, on the ground that it was a different conversation than that testified to by the witness for the State. This ruling was held to be erroneous, the court saying: "It was the right of Frank to lay before them [the jury] every circumstance, connected with his statement to Mr. Bruton, which could aid them in coming to a conclusion upon this question of intent. He should not have been confined to what appeared in Mr. Bruton's testimony, but should have been permitted to submit to the jury the testimony which was offered by the prisoners and rejected by the court, as the same is hereinabove set forth. In rejecting the testimony thus offered, the court below erred. *State v. Curtis*, 12 Ired. 270; *United States v. Craig*, 4 Wash. C. C. 729; *Barthelemy v. People*, 2 Hill (N. Y.) 248; *Cornelius v. State*, 12 Ark. 782; 1 Starkie on Ev. 46-48; 2 Waterman's Arch. Cr. Pl. 212, 213."

On another view of the question, counsel for appellant contend that as the State, through its witness, Mrs. McCusker, introduced evidence to prove that appellant requested her to retire from the room in which he and the deceased were at the residence of Dr. Leach, and then in her absence held a private conversation with Miss Farwig, that, therefore, he was entitled, for this reason, to lay before the jury what was said by him in the conversation. That inasmuch as the State had introduced his action of engaging in a private conversation with the girl, that therefore he had the right to prove or lay before the jury all that was said

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in the conversation, not only to explain or rebut the part introduced against him, but as a part of the *res gestae* of his said act, and we are cited to *Morrow v. State*, 48 Ind. 432, in support of the latter proposition. This case was a prosecution for the murder of one Christopher. The theory of the State was that criminal relations existed between the accused and Mrs. Christopher, the wife of the deceased, hence, the motive upon the part of the defendant in the commission of the crime. The State, to sustain its theory at least in part, proved by a witness that after the murder of the deceased by the defendant, that the latter went to the house where Mrs. Christopher, the wife, was in bed, and went to her bedside and held a whispered conversation with her. The defendant when giving evidence in his own behalf offered to show what he said to Mrs. Christopher in the conversation in question, proposed to prove that he spoke to her about employing a girl to help the family while in their "wounded condition." The trial court excluded the evidence. This ruling in that appeal was held to be erroneous, the court saying: "It is exceedingly unjust to an accused party to admit his act in evidence, and to allow it to be insisted that the act is one of criminality or evidence of criminality, and at the same time to exclude what was said by the accused, at the time of and connected with the act, in explanation of its character. The naked act may import or be construed as importing criminality, when, taken in connection with what was said, it may be innocent or even commendable. It must be seen on a moment's reflection, that what, in this case, was produced by the officer of the State as an inculpatory fact, would, if accompanied by the words sought to be proved by the defendant, have been at once rendered innocent and harmless. It would be no more unjust to the defendant, in such a case, to permit the State's attorney to prove such part of a conversation of the defendant as tended to make out the State's case, and exclude the residue because it was favorable to the defendant. We had occasion

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to examine the authorities on this subject, to some extent, in *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22, and that case and the authorities cited will sustain our ruling in this case. We hold that the ruling of the court was erroneous."

*Comfort v. People*, 54 Ill. 404, was a prosecution for the larceny of a watch. The People were permitted to prove by a witness that the defendant was seen in possession of the watch in question the next day after the larceny, and that he wanted to borrow \$50 of a pawnbroker and pawn the watch as security. That the broker loaned him \$40 and accepted the watch as such security. The defense then offered to prove by the witness all that the accused said in connection with the subject when he first offered to pawn the watch, and what he said as to how he obtained possession of the watch. The court refused to allow this proof to be made, and the ruling on appeal was held to be wrong, the supreme court saying: "The prosecution having introduced evidence that plaintiff in error was in possession of the watch the next day after it was stolen, and what he said with reference to borrowing the money and pledging it as security, as evidence of his guilt, he unquestionably had the right to prove all he said in that conversation, not only as a part of the *res gestae*, but as a part of the conversation. The fact that he had the watch in possession and was offering to pledge it for the money, was introduced to prove he was exercising ownership over it, and also, being recently after it was stolen, as evidence that he had perpetrated the larceny. These acts being relied upon to establish his guilt, he had a right to have the remainder of what he said at the time go to the jury to be considered." See, also, Jones on Ev. §347.

The authorities which we have cited fully sustain the proposition that whether the proposed evidence is viewed or considered as a part of the *res gestae* of appellant's act in holding a private conversation with the girl upon whom the crime was alleged to have been perpetrated, which act was laid before the jury by the State in the first instance, or

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whether it be viewed or considered as it must be as a part of the same conversation continued by the parties in question in the absence of Mrs. McCusker, the evidence, in our opinion, was relevant and admissible, and should have been admitted. If the jury believed it, it would have, at least, materially tended to rebut, explain, or qualify the portion of the conversation introduced by the State for the purpose of criminating appellant. If the proposed evidence had been laid before the jury it would also have had a tendency to explain to them his act as disclosed by the State, of holding a private conversation with the deceased. It would, perhaps, have led the jury to infer that this conversation, under the circumstances, was a proper or innocent one. The part thereof introduced by the State considered separately from the residue might well have led the jury to believe that the accused was endeavoring to induce Miss Farwig to suppress the truth in regard to the commission of the alleged crime or of criminating matters pertaining thereto; and unexplained or rebutted would certainly be damaging evidence against him. The State, having in the first instance opened the door and let in the fact of the conversation and a part that was said therein, was certainly not in the position to exclude the residue thereof which was relevant to the portion which it had introduced. The fact that the witness, Mrs. McCusker, did not hear the remainder of the conversation in question by reason of her being absent from the room, would not, under the circumstances, render it inadmissible as evidence in behalf of the defendant. We conclude, therefore, for the reasons given, that the court, under the circumstances, erred in imposing the limit which it did in respect to the admission of the conversation and in excluding the evidence from the consideration of the jury.

Another material question is presented for review by appellant's counsel. On the trial the State raised the issue as to whether appellant, when he visited Miss Farwig at the

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home of Dr. Leach on the occasion previously stated, had falsely represented himself to be her husband. The State introduced Mrs. McCusker, the nurse, who testified that appellant on that occasion said that he was the sick woman's husband. Dr. Green, another witness on the part of the State, was not certain what was said by the appellant at that time on the subject, but testified that he thought that the gentleman to whom he was introduced at Leach's said the woman was his wife. The State also introduced Dr. Bowles as a witness to prove that appellant had at the time and on the occasion in question made the representation in regard to the woman being his wife. This witness, however, was wholly unable to give even the substance of what was said by appellant on the subject at the time referred to at Dr. Leach's. Thereupon the attorney for the State interrogated the witness as follows: "What was your understanding from the conversation between Leach and Diehl and yourself as to what relation he bore to this woman, whether husband or otherwise?" To this question appellant objected on the ground that it called for a mere conclusion, and did not call for a fact, etc., that what was said, if anything, should be given, and that the mere conclusion or understanding of the witness was not proper as evidence. This objection was overruled by the court, to which appellant excepted, and the witness then answered the question propounded as follows: "Well, I got the understanding that they were man and wife." Thereupon appellant moved the court to strike out this answer and evidence of the witness stating the same reasons at greater length than were stated in the original objection. This motion the court overruled, to which appellant excepted. In permitting this witness to give to the jury his mere understanding, which he obtained from the conversation referred to in the question propounded by the State, counsel for appellant contend that the court erred. In this contention we concur. Appellant in his evidence denied that he had either on the occasion in question or at any

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other time represented or said that the woman was his wife. The burden was upon the State to prove the alleged fact to the satisfaction of the jury. It would seem unnecessary to refer to authorities in support of the well settled rule that a witness, as a general proposition, must be confined to the statement of facts, and cannot be permitted to indulge in or give in evidence his mere conclusions, opinions, or understanding. . It was the province of the witness, under the circumstances, to state to the jury what was said by appellant or in his presence in respect to the subject in issue, and leave it to the jury to draw their own inferences from his statement. The understanding of this witness in respect to the alleged misrepresentation of appellant might, for aught appearing to the contrary, have turned the scale against him on this issue. As said in *Thompson v. Wilson*, 34 Ind. 94. "It would be very dangerous for this court to determine what evidence did or did not influence the jury." That the court erred in admitting this evidence certainly can not be successfully disputed. See, *Phares v. Barber*, 61 Ill. 271; Jones on Ev., §137.

It is next insisted that the court erred in refusing to give to the jury certain instructions at the request of appellant. It is strenuously urged by his counsel that thereby he was deprived of having the theory of his defense properly presented to the jury by instructions from the court. If this contention could be sustained it would follow that he was deprived of one of his essential rights. See, *Banks v. State*, ante, 190, and authorities there cited.

We cannot determine the questions raised upon the instructions refused, for the reason that the record discloses that some of those requested by appellant were given, while others were refused. The bill of exceptions containing the instructions given by the court on its own motion and those refused at the request of appellant, affirmatively discloses on its face that instructions numbered two, eleven, twenty-six, and twenty-eight, in the series requested by appellant,

## Barnett v. Bryce Furnace Co.

were given by the court, but they do not appear in the bill of exceptions or elsewhere in the record so far as we have been able to ascertain. As the instructions mentioned are absent from the record, we are not in a position to decide that when they are considered in connection with those given by the court on its own motion that the jury were not fully advised in regard to every feature or phase of the case presented by the evidence.

It is next insisted that the evidence is wholly insufficient. Especially is it insisted that there is no evidence to show an absence of the necessity of producing the alleged abortion in order to save the life of the woman in question. The evidence in respect to the commission of the alleged offense is, as is usually the fact in cases of this kind, by reason of the secret nature of the offense, wholly circumstantial. As the judgment must be reversed for the errors mentioned, it would not be proper for us to express an opinion in regard to the sufficiency of the evidence, but we may suggest, in passing, that the absence of the necessity for producing the abortion in cases of this kind in order to save the life of the mother may be shown by circumstantial evidence. Ency. of Law and Proc., p. 190.

For the errors pointed out the judgment is reversed, and the cause remanded to the lower court, with instructions to grant appellant a new trial. The clerk will issue the necessary order for the return of the prisoner to the sheriff of Henry county.

## BARNETT ET AL. v. THE BRYCE FURNACE COMPANY.

[No. 3,755. Filed December 12, 1901.]

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APPEALS.—*Transfer of Cause From Appellate Court.*—Under subdivision 2 of §10 of the act of March 12, 1901, concerning appeals, the losing party in the Appellate Court, may have his cause transferred to the Supreme Court when the opinion contravenes a ruling precedent, or involves an erroneous decision of a new question, but a transfer will not be granted on the ground that the Appellate Court has misapprehended or misstated the facts as disclosed by the record.



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Barnett v. Bryce Furnace Co.

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Application for transfer from Appellate Court. A judgment for defendant was affirmed, on appeal, by the Appellate Court, and plaintiff made application for transfer of the cause to the Supreme Court. *Transfer denied.*

*G. W. Holman* and *R. C. Stephenson*, for appellants.

*I. Conner, J. Rowley* and *J. H. Bibler*, for appellee.

BAKER, J.—In the second subdivision of section ten of an act concerning appeals (Acts 1901, p. 567, §1337j Burns 1901, §6565f Horner 1901) it is provided that the losing party in the Appellate Court may file in the Supreme Court an application for the transfer of the case to the Supreme Court “on the ground that the opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court or that a new question of law is directly involved and was decided erroneously”. The judgment of the trial court was affirmed by the Appellate Court. *Barnett v. Bryce Furnace Co.*, 28 Ind. App. ——. Appellants have duly filed their application for transfer, and have assigned both of the grounds named in subdivision two of section ten of the statute. We find that the *opinion* of the Appellate Court neither contravenes any ruling precedent of this court nor involves a new question of law which has been decided erroneously. Appellants claim that a study of the record would disclose to us that the wrong result has been reached by the Appellate Court. If this is so, it must be due to a misapprehension or misstatement of the record by the Appellate Court. The plain purpose of the subdivision in question, however, was not to give this court jurisdiction to determine whether the facts in cases which are not appealable here as a matter of right have been correctly understood and stated by the Appellate Court, but to authorize this court to control the declaration of legal principles. Prior to the enactment of the law of 1901, the statute in force professed to bind parties, in causes within the jurisdiction of the Appellate Court, by that court’s holding upon the law as well as upon the facts. To overcome the existence, or obviate the possibility, of con-

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flict between the Supreme and Appellate Courts in their respective pronouncements of the law, was the object to be attained by subdivision two of section ten. Subdivision three of that section provides for appeals from the Appellate Court to this court in certain cases as a matter of right. In a case of that class the whole record comes here and the cause stands for adjudication as if it had been appealed to this court in the first instance. If the legislature had intended that every case decided by the Appellate Court should be reviewable in that way, the clear distinctions that exist between subdivisions two and three of section ten would not have been made.

The application is denied.

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CRAIG v. THE STATE.

[No. 19,688. Filed December 13, 1901.]

**ROBBERY.—Indictment.—Assault.**—Where, in an indictment for robbery, an assault is alleged in connection therewith, it is not necessary to the sufficiency of the indictment that it also contain an allegation that the defendant “had the present ability” to commit the robbery. *p. 575.*

**SAME.—Indictment.**—In an indictment for robbery it is not necessary to allege an assault by the defendant on the prosecuting witness. *p. 576.*

**SAME.—Indictment.—Use of Word “Violently.”**—An allegation in an indictment for robbery, that the articles stolen were taken “violently” is equivalent to an allegation that they were taken “by violence.” *pp. 576, 577.*

From Henry Circuit Court; *W. O. Barnard*, Judge.

From a conviction for robbery, defendant appeals. *Affirmed.*

*T. E. Beach*, for appellant.

*W. L. Taylor*, Attorney-General, and *W. R. Steele*, for State.

**DOWLING, J.**—The appellant was charged upon indictment with the crime of robbery. He was tried by a jury and found guilty. Judgment was rendered on the verdict. **A**

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reversal of the judgment is sought upon the grounds that the court erred in overruling the motions to quash the indictment, and for a new trial.

The first objection urged against the sufficiency of the indictment is, that while it alleges that the defendant "on, etc., at, etc., made an assault upon one Joseph Metz," etc., it fails to show that the defendant had "the present ability to commit a violent injury" on the person of the prosecuting witness. It is insisted that the latter averment was necessary to a proper description of the offense, and that without it the indictment was bad. Counsel for appellant contends that as an *assault* is now a statutory misdemeanor, its ingredients should be set forth specifically whenever it constitutes a material part of the description of another offense. In support of this position, counsel refer us to §1983 Burns 1894; *Adell v. State*, 34 Ind. 543; *State v. Hubbs*, 58 Ind. 415; *Howard v. State*, 67 Ind. 401; *Chandler v. State*, 141 Ind. 106; *Woodworth v. State*, 145 Ind. 276.

These cases decide that where an assault is charged as an element of a felony consisting of such assault, coupled with an intent to commit a crime of violence against the person of another, such as an assault with intent to murder, the indictment must allege that the defendant had the present ability to commit the threatened injury. And this, undoubtedly, is good law. But where the assault is alleged in connection with a charge that the violent injury was, in fact, committed upon the person of the prosecuting witness, the ability of the defendant to commit the injury need not be otherwise averred: The inference of his present ability to commit the injury results, inevitably, from the allegation that he did actually commit it. In an indictment for an assault and battery with intent, if the facts constituting the battery are stated the assault need not be described, it being merged in the higher offense. In the indictment before us the assault is necessarily included in the subsequent descrip-

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tion of the offense, which consisted in forcibly and feloniously taking from the person of the prosecuting witness articles of value, violently, or by violence.

In *Chandler v. State*, 141 Ind. 106, it is said on page 112: "There is no charge in the information that the defendant had the then present ability to commit the alleged violent injury. But it does allege that he actually did commit the same. \* \* \* An intent to charge an assault merely, with the felonious intent, is clearly negatived by the language just quoted. The actual battery is charged and thereby the lesser misdemeanor of an assault is merged in the greater of an assault and battery."

Besides, the allegation of the indictment as to the assault was unnecessary, and may be rejected altogether without impairing the pleading. The offense of robbery is so described in the criminal code that it may be sufficiently charged in the language of the statute, or in equivalent terms. It consists in forcibly and feloniously taking from the person of another any article of value by violence, or by putting in fear. A charge that a defendant forcibly and feloniously took from the person of another an article of value, describing it, and stating its value, and the name of its owner, by violence, would in these respects be sufficient without any mention of an assault.

It is insisted in the next place that the indictment is bad because it fails to aver that the articles taken from the person of the prosecuting witness were taken "by violence", these words being a part of the statutory definition of the crime. The indictment does charge that they were taken "violently". This, we think, is fairly equivalent to an allegation that they were taken by violence. The definition of "violently" is "in a violent manner"; and "violent" is defined as "moving or acting with physical strength"; "urged or impelled with force"; "acting characterized, or produced by improper force". Webster's Int. Dic. The signification of the word "violently" when applied to the forcible and

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felonious taking of articles of value from the person of another, is not strained when held to be the equivalent of the words "by violence." The rule is that the exact words of the statute need not be employed, but that words which import the same meaning, if employed instead, will be sufficient. *Chandler v. State*, 141 Ind. 106, 113, and cases cited.

The remaining question is whether the verdict is contrary to the law, or to the evidence. The evidence was of such a nature that the jury might well reach the conclusion that the defendant was guilty of the crime of robbery. They had the advantage of seeing and hearing the witnesses of both sides, and we cannot presume anything against the fairness of their decision. It is sufficient to say that there was evidence which supported the verdict. The jury were the exclusive judges of its weight, and we have no power to say that their estimate was an erroneous one.

There is no error. Judgment affirmed.

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WYNEGAR v. THE STATE.

[No. 19,682. Filed December 17, 1901.]

**EMBEZZLEMENT.—Appropriation of Money by Bailee.—Agency.**—A person who appropriates to his own use money left in his hands, as bailee, is an agent of the bailor within the meaning of §2022 Burns 1901, which provides that every officer, agent or employee who shall, while in such employment, take any money belonging to such person in whose employment said agent may be shall be deemed guilty of embezzlement.

From Marion Criminal Court; *Fremont Alford*, Judge.

Clyde Wynegar was convicted of embezzlement, and appeals. *Affirmed.*

*H. N. Spaan*, for appellant.

*W. L. Taylor*, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

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HADLEY, J.—Appellant was tried upon an indictment containing two counts. The first was an ordinary charge of larceny. The second alleged that appellant upon the 26th day of January, 1901, at and in Marion county and State of Indiana, was then and there acting as agent of Charles Hayes, and as such agent then and there had control and possession of \$420 in money the property of said Charles Hayes, to the possession of which money the said Charles Hayes then and there was entitled; that the said appellant while acting as the agent of the said Hayes, and in possession and control of such money as aforesaid, did then and there unlawfully and feloniously and without the consent of said Hayes, purloin, embezzle, and appropriate to his own use all of said money, contrary, etc. Appellant was acquitted on the first and convicted on the second count of the indictment. His only complaint here is that the verdict of the jury was contrary to law and the evidence. The conviction rests upon §2022 Burns 1901, the material part of which reads thus: "Every officer, agent, attorney, clerk, servant, or employe or any person \* \* \* who, having access to, control, or possession of any money \* \* \* to the possession of which his or her employer or employers is or are entitled, shall, while in such employment, take, purloin, secrete, or in any way whatever appropriate to his or her own use \* \* \* any money \* \* \* belonging to \* \* \* such person \* \* \* in whose employment said \* \* \* agent \* \* \* may be, shall be deemed guilty of embezzlement," etc. The uncontroverted facts are, in substance, these: The prosecuting witness, Charles Hayes, a colored man, and common laborer, on the afternoon of Saturday, January 26, 1901, came into the possession of \$469. Between 7 and 8 o'clock the same evening he went to the saloon kept by appellant and requested the latter to keep the money for him in the safe until the following Monday morning. Appellant accepted of Hayes \$420 of the money as requested and placed it in the safe. Between the time the money was

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placed in the safe, and some time on the following day (Sunday), appellant, without the knowledge or consent of Hayes, took the money, left town and appropriated all the money to his own use. About two weeks later appellant was arrested in New Albany.

Upon these facts he was found guilty of embezzlement, and not guilty of larceny. His contention here is that he was not guilty of embezzlement (1) because the prosecuting witness continued to retain at least constructive possession of the money, and that a felonious taking of property when the same is in the possession of the owner is larceny, and not embezzlement, and (2) because he was in no sense the agent of the prosecuting witness within the meaning of the statute above quoted. With respect to the first point we shall not stop to inquire whether these facts would sustain a charge of larceny under a former statute, for if it should turn out that they would, it does not necessarily follow that the conviction under §2022, *supra*, was erroneous. It frequently happens that the same facts fall within the statutory definition of more than one public offense. The legislature has the undoubted right to declare to be criminal, any wilful or wrongful trespass upon the rights of another, and to call the crime by any name it chooses. It may therefore declare to be embezzlement a state of facts which under a former statute constituted larceny. The only material question, then, is whether the facts bring the case within the provisions of the statute under which the appellant was convicted. The term agent is one of wide signification. It is defined to be "one who acts for another by authority from him", Webster's Int. Dict.; "one who undertakes to transact some business, or manage some affair for another, by authority and on account of the latter, and to render an account of it", 1 Am. & Eng. Ency of Law (2nd ed.) 938. The term agent may, therefore, be said to apply to any one who by authority performs an act for another. We have numerous sections in the criminal code which define what shall constitute embez-

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zlement in specified cases, and the purpose intended by §2022, *supra*, would seem to be, to embrace all other persons who voluntarily assume to another a relation of trust and confidence; and whether the relation assumed be that of any kind of an officer, or any kind of an agent, attorney, clerk, servant, or employe, if the employment be of a character necessarily to involve confidence, and to afford the opportunity to commit the trespass complained of, it falls within the provisions of said section. The distinction between §2006 defining larceny and §2022 is clear. The larceny provision relates to cases where the property feloniously taken is at the time in the actual possession of the owner, or has been wrongfully obtained from him by fraud, while §2022 relates to cases where the property at the time of the conversion is rightfully in the control or possession of the wrongdoer by virtue of his employment. *Colip v. State*, 153 Ind. 584, 74 Am. St. 322; *State v. Wingo*, 89 Ind. 204.

Here appellant by authority and employment of Hayes undertook to perform an act of special trust for the latter, namely, to keep his money for him from Saturday to Monday, and then return it. Hayes gave his money to appellant because he believed he was honest, and would observe ordinary care to keep it safely for him, and restore it upon request. The request of itself was sufficient to impart to appellant the knowledge that the money was offered in a spirit of confidence, and when appellant accepted it upon the terms proposed, he impliedly promised to perform faithfully what he had undertaken. We grant the contention that appellant was a naked bailee, but this does not affect the question. He was also an agent within the meaning of the statute, and the absence of a consideration gave appellant no license to appropriate the money. Judgment affirmed.



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State, *ex rel.*, v. Clifton.

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THE STATE, EX REL. LOONEY, TRUSTEE, v. CLIFTON,  
ROAD SUPERVISOR.

[No. 19,510. Filed December 18, 1901.]

**TOWNSHIP TRUSTEE.**—*Road Supervisor.*—*Bridges.*—Section 8068 Burns 1901 makes it the duty of the township trustee to care for and manage all property belonging to the township and to superintend all the interests thereof. By §6818 Burns 1901, the road supervisor is required to carry into effect all orders of the trustee, touching highways and bridges. *Held*, that the trustee is the superior officer, and when he gives the supervisor specific directions to build a bridge or culvert, the supervisor must carry the orders of the trustee into effect.

From Rush Circuit Court; *L. P. Newby*, Special Judge.

Mandamus proceeding by State on relation of George W. Looney, Jr., township trustee, against Samuel F. Clifton, road supervisor, to require the latter to build a culvert as directed. From a judgment for defendant, relator appeals. *Reversed.*

*D. W. McKee, H. E. Barrett, S. L. Innis* and *W. G. Morgan*, for appellant.

*B. L. Smith, C. Cambern, D. L. Smith, G. W. Young* and *V. A. Young*, for appellee.

**BAKER, J.**—Relator was township trustee, and appellee was supervisor of a road district in relator's township, during the time covered by the matters involved in this action. On March 23, 1898, a small bridge or culvert forming part of a highway in appellee's district, was washed out. On the next day and at other times preceding July 19, 1898, relator, as township trustee, ordered appellee, as road supervisor, to build a new bridge or culvert in a specified manner and informed him that his drafts for the expense thereof would be honored. On July 19, 1898, relator instituted this proceeding to obtain a peremptory writ, mandating appellee to build the culvert as it had been ordered by relator. On August 6, 1898, in vacation, relator filed an application for

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*State, ex rel., v. Clifton.*

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a temporary restraining order, showing that his directions to appellee were for the construction of a wooden bridge, that appellee refused to obey, that appellee was threatening and intending to build a stone bridge or culvert and was about to take and use certain stone belonging to the township and to employ workmen, over relator's objections. At the hearing on August 20, 1898, the court issued an order restraining appellee from proceeding to construct a stone bridge or culvert until the final hearing of the case or the further order of the court. Various amendments to the pleadings were made, and the application or complaint upon which the case was tried was not filed till May 11, 1899, to which the return or answer was filed on June 23, 1899. The court found for appellee, and rendered judgment in his favor for costs and dissolving the restraining order. The assignments are that the court erred in overruling the demurrer to the answer and in refusing a new trial.

The amended application, after stating the official positions of the parties and the impassable condition of the road, proceeded to charge "that on March 24, 1898, being the next day after the washout occurred, relator as trustee notified defendant as supervisor of the condition of the highway, and on that date and at various other times prior to June 15, 1898, orally, and on June 15, 1898, and before commencing this action, in writing, requested and commanded defendant as supervisor to repair the highway, where the culvert had been washed out, in the following manner,—by procuring not less than four sills of substantial timber, not less than twelve inches thick, and long enough to extend across the washout and onto the firm bank on each side a sufficient distance for safety, not less than five feet, the sills to be placed across the washout at uniform distances of four feet apart and the ends to be let into the surface of the grade to such a depth that when covered with three-inch bridge flooring the surface would be level with the grade of the highway on each side, the bridge to be floored with three-inch oak planks

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sixteen feet long; that on each occasion relator also notified defendant that there was in relator's hands as trustee, subject to defendant's order as supervisor, a sufficient fund to pay for the necessary materials and labor and that defendant's orders therefor would be promptly honored and paid; that at all times since March 24, 1898, it has been within the power and ability of defendant as supervisor to construct the repairs, and that the same if so constructed would furnish a safe and convenient passage over such washout for all the travel that passes over the highway; that the highway continues in the same condition it was in on March 24, 1898; that by reason of the grade of the highway at the point in question and the marshy character of the ground it is impracticable for ordinary loads to be hauled safely down the grade and across the brook, and by reason thereof public travel is greatly impeded; that defendant has continuously refused to make the repairs. Wherefore," etc.

The return or answer, after admitting the notice and direction given to defendant by relator, alleges "that defendant at no time refused to repair the highway, but on the contrary as soon as possible after the highway became out of repair and before the commencement of this action he procured stone and other materials and had teams engaged to build a substantial stone culvert, when he was restrained by order of this court; that afterwards plaintiff filed an amended complaint in which no injunction was asked, and thereupon defendant was advised by his attorneys that such action by plaintiff was a dismissal of the injunction proceedings and that he could proceed with the building of the culvert as he chose; that thereupon defendant constructed a substantial stone culvert, and the highway is now in good condition; that in defendant's opinion the manner in which he was ordered to repair the highway was unsuitable, and for that reason he refused to obey relator's orders and proceeded to make what he considered proper repairs, as he believed he had the right to do. Wherefore," etc.

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*State, ex rel., v. Clifton.*

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This answer, showing a defiance of the trustee's directions and a disregard of the restraining order, could be held good only on the theory that the control of the construction of the new bridge or culvert rested with the supervisor.

Among the trustee's duties are these: "To see to a proper application of all moneys belonging to the township for road, school or other purposes, \* \* \*. To have the care and management of all property, real and personal, belonging to the township, and to superintend all the interests thereof." §8068 Burns 1901, §5993 R. S. 1881 and Horner 1897.

It is the supervisor's duty to "carry into effect all orders of the trustee \* \* \*, touching the highways and bridges therein and keep the same in good repair". §6818 Burns 1901.

From a consideration of these sections, as well as of the whole of article 7 of chapter 76 relating to the construction and repair of highways and to the respective duties of trustee and supervisor (§§6813-6854 Burns 1901), we think it is clear that the legislature never intended that there should be a conflict of authority, and that the trustee is the superior officer. The trustee, with the concurrence of the county commissioners, levies the road tax; and he directs and controls the expenditure thereof. If all the supervisors in a township had the right to build stone culverts or bridges where the trustee ordered wooden ones, the trustee's control of the finances of the township would be flimsy indeed.

If the trustee should give the supervisor only general orders undoubtedly the supervisor could exercise his discretion as to details. *State, ex rel., v. Kamman*, 151 Ind. 407. But if the trustee gives specific directions, as in this case, the supervisor must "carry the orders of the trustee into effect".

Judgment reversed, with directions to sustain the demurrer to the answer.

Shedd v. Webb.

187 585  
180 582

SHEDD ET AL. v. WEBB ET AL.

[No. 19,190. Filed Oct. 1, 1901. Rehearing denied Dec. 18, 1901.]

MORTGAGES.—*Foreclosure.—Disputing Title of Grantor.—Estoppel.*

—*Fraud.*—In an action to foreclose a mortgage, it appeared that defendant railway company had possession of the lands in controversy under legislative authority, and had occupied the same, except a strip six feet wide, for more than forty years, as a right of way, claiming title thereto, but having no record title. The owners of the lands traversed by the right of way conveyed the right of way to a third person, who executed back his note and mortgage for the purchase money, and afterward sold and conveyed the strip of land to the railroad company, the mortgagees withholding their mortgage from record until the sale and conveyance was completed, the mortgagor and mortgagees representing to the company that there was no lien or incumbrance thereon. *Held*, that defendant company was not estopped to dispute plaintiff's claim of title to the land described in the mortgage. *pp.* 585-591.

ESTOPPEL.—*Fraud.*—Where one with full knowledge of his rights and the facts, wilfully, by words or conduct, causes another to believe in the existence of a certain state of things, and thereby induces the other to act on that belief and expend money or assume obligations which he would not otherwise have done, the former will not be permitted, as against the latter, to show that a different state of facts existed at the time. *p.* 589.

APPEAL AND ERROR.—*Practice.*—A cause will not be reversed because of the denial of a motion for a new trial, based upon the ruling of the court in the admission and rejection of evidence, and upon newly discovered evidence, where the facts found, and the evidence in support thereof, clearly show that the merits of the cause have been fairly tried and determined. *p.* 591.

From Lake Circuit Court; *J. H. Gillett*, Judge.

Suit by E. A. Shedd and others against J. A. Webb and the Lake Shore and Michigan Southern Railway Company to foreclose a mortgage. From a judgment in favor of the railway company, plaintiffs appeal. *Affirmed.*

*J. W. Youche*, for appellants.

*C. W. Miller* and *J. S. Drake*, for appellees.

HADLEY, J.—Action by appellants to foreclose a mortgage on a strip of ground 100 feet wide, and half a mile

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long, for the collection of an alleged debt of \$15,600. All of said land, except six feet thereof in width, was claimed by appellee, railway company, for its right of way, and was occupied by its railroad tracks.

Webb, the mortgagor, defaulted. The railway company presented what it terms a cross-complaint and ten paragraphs of answer. The first nine answers were all partial. The first and third set up a former adjudication of the plaintiff's title as to ninety-four and eighty feet, respectively, of the mortgaged premises. The fifth counted upon a legislative grant for ninety-four of the 100 feet. The sixth upon a legislative grant for eighty feet, and the seventh upon adverse possession under claim of right as to eighty feet for more than twenty years. The eleventh was a general denial. Appellants' separate demurrer was sustained to the second, fourth, eighth, and ninth, and overruled as to the fifth, sixth, seventh, and eleventh. The record discloses no ruling upon appellants' demurrer to the cross-complaint, which was answered by the general denial. The cross-complaint is against the plaintiffs, Shedd and Roby, and the codefendant Webb, and counts upon their joint and active fraud. Special finding of facts. Conclusions of law and judgment for the railway company. Appellants' motion for a new trial was overruled. There were two mortgages and two paragraphs of complaint, but no question is raised in this court upon the second mortgage and second paragraph of complaint, and the same will receive no further notice.

As sufficient to a full and complete determination of the cause it is expressly provided in the decree that the adjudication is limited and permitted "to extend no further as between the plaintiffs [appellants] and the defendant Lake Shore and Michigan Southern Railway Company than to adjudge that the mortgage referred to is void as to it, and to deny a foreclosure thereof as against it." The question adjudicated appropriately arises upon the cross-complaint. The facts germane to the issue upon the cross-complaint, set forth in the special finding, are in substance as follows: In

1835 the legislature chartered the Buffalo and Mississippi Railroad Company to build a line of railroad across Lake county, Indiana. The mortgaged premises, with much other lands, were granted by the United States to the State of Indiana, by letters patent on March 24, 1853, as "swamp lands", in conformity to the act of Congress of 1850 and pursuant to a request by the Governor of Indiana to the United States for such patent for said lands, made December 18, 1852.

March 5, 1853, the Indiana legislature passed an act purporting thereby to grant a right of way "through any swamp lands belonging to the State, to any railroad company organized, or to be organized under the laws of this State—such right of way to be to the width of 100 feet". Acts 1853, p. 108. In the fall of 1853, but prior to November 15th of that year, the successor to the rights of the Buffalo and Mississippi Railroad Company and grantor of appellee railway company, accepted said legislative grant and at the time of such acceptance entered upon the lands described in the mortgage, except a strip six feet wide off the southwest side thereof, and said grantor and said appellee have ever since operated its railway upon and claimed title to the mortgaged premises, except said six-foot strip, by virtue of the passage, acceptance, and entry, under said legislative act.

November 15, 1853, the State of Indiana sold as swamp land and issued certificates of purchase to George W. Clark for three certain lots of land traversed by the mortgaged premises and on July 3, 1854, issued its patent to said Clark for said lands. By *mesne* conveyances from Clark, appellants became and remain the owners of said lots, except as hereinafter stated. The mortgaged strip extends across said three lots, leaving parts of said lots on each side thereof. In addition to maintaining possession of said railroad track, said railway company constructed, prior to 1865, and has continuously to this date maintained, telegraph poles, and side fences, or remains thereof, parallel to the track, and such visible markings of possession as were calculated to put

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all persons concerned upon inquiry as to the extent of the railway company's actual possession. On March 15, 1893, appellants Shedd and Roby executed to appellee James A. Webb their quitclaim deed for said 100-foot strip of land, and on the same day Webb executed back to Shedd and Roby the notes and mortgage sued on to secure the purchase money. On March 25, 1893, Webb and wife executed to the railway company their warranty deed for said strip for an agreed and valuable consideration. At the time of the conveyance to Webb it was agreed between Shedd, Roby and Webb that each should represent to the railway company that there was no lien, mortgage, or other encumbrance on said land, and, pursuant to said agreement, Shedd, Roby and Webb did, after the execution of the mortgage and before the railway company had accepted the deed from Webb, represent to the company that there was no lien, mortgage, or other encumbrance thereon, and by means of said false representations did induce the company to accept said deed, which it would not otherwise have done, with intent thereby to defraud the company to the amount of the mortgage. In aid of the conspiracy to defraud the company, Shedd and Roby withheld their mortgage from record until after the company had accepted the deed from Webb, and duly recorded the same on April 14, 1893. When the railroad accepted the deed from Webb, it had no knowledge or notice that there was any mortgage or encumbrance on the land, and believed in good faith that there was no mortgage or other encumbrance thereon. When the railway company accepted the deed from Webb it was in the actual, open, notorious, and exclusive adverse possession of all the mortgaged premises, except six feet off the southwest side thereof, under a claim of right, and did not take any possession under its deed from Webb.

The court stated its conclusions of law upon the facts found in effect as follows: (1) That the defendant railway company should be relieved of any estoppel to dispute



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the plaintiffs' claim of title to the land described in the mortgage. (2) That the plaintiffs should have their foreclosure as prayed to recover the amount found due them, together with their costs as against the defendant Webb, but as against the defendant railway company the mortgage described in the complaint should be adjudged null and void. (3) That the court should and does extend this adjudication no further, as between plaintiffs and said railway company than to relieve said company of said estoppel by deed, to adjudge the mortgage void as to it, and to deny a foreclosure thereof as against it.

The facts averred in the so-called cross-complaint are substantially the same as those stated in the special finding above set forth. There is evidence in the record, both written and oral, that tends to prove all those facts. Assuming, therefore, that the facts found are true, we come to the question presented by the exceptions to the conclusions of law. Here there seems little room for controversy. It is a familiar rule that where one with full knowledge of his rights and the facts, wilfully, by words, or conduct, causes another to believe in the existence of a certain state of things, and thereby induces the other to act on that belief, and expend money or assume obligations which he would not otherwise have done, the former will not be permitted, as against the latter, to show that a different state of facts existed at the time. *Bobbitt v. Shryer*, 70 Ind. 513; *Dodge v. Pope*, 93 Ind. 480; *Wisehart v. Hedrick*, 118 Ind. 341.

The facts here bring this case far within the rule. The railway company had no record title to its right of way, but had possession of the lands in controversy under legislative authority expressed in 1853, for more than forty years, except a strip six feet wide, and has ever since operated its railroad thereon and claimed title thereto. In 1889, the special finding further shows, Dayton S. Morgan and Ashley Smith, being then the owners of the lots of land traversed by the mortgaged premises, by appellant Ed-

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ward S. Roby, as their attorney, prosecuted in the Lake Circuit Court to final judgment, which is still in force, an action against appellee railway company, to recover possession of the identical lands, or an assessment of damages, and were unsuccessful both in the circuit and in this court on appeal (*Morgan v. Lake Shore, etc., R. Co.*, 130 Ind. 101) and, pending that litigation, and while the case was here on appeal, appellants Shedd and Roby took a deed for the premises from Morgan and Smith, and received the land impressed with all the binding force and effect of said judgment.

Roby, being the active attorney of Morgan and Smith in the suit prosecuted by them, had actual knowledge that his grantors had had their day in court with the railway company, and that the judgment was in favor of the company. With this knowledge, and standing in the shoes of Morgan and Smith, it was obviously the purpose of appellants to secure a retrial of the company's right of possession by a legal fiction which involved the necessity of entrapping the company into the acceptance of title by and through them, and possibly the incidental advantage of inducing the company to assume, as a consideration, the obligation of providing conveniences, at large expense, that would promote the private interests of appellants in the town of Roby. It was to carry this scheme forward that appellants' mortgage was acquired and by them withheld from public record until the false representations of the trio had succeeded in accomplishing the fraudulent purpose. This was much more than a standing by,—much more than a passive fraud, which in many instances will estop the guilty party from asserting a fact contrary to that reasonably inferred from his conduct, to the injury of one misled thereby. *Vickery v. Board, etc.*, 134 Ind. 554, 556; *Board, etc., v. Plotner*, 149 Ind. 116. It was a preconceived plan to secure by dishonest means that which could not be otherwise obtained. To give countenance to such conduct would bring reproach

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upon the law. The court did not err in its conclusions of law.

Appellants having conveyed the mortgaged premises to the mortgagor by quitclaim deed, the only interest they have, or claim to have, is in virtue of their mortgage, and when it is found to be void, their right to litigate the title ceases. The questions, therefore, arising upon the other pleadings become immaterial.

Many questions are presented as reasons for a new trial, but they arise chiefly upon the admission and rejection of evidence, which, with very few exceptions, relate to the issues not considered in this opinion, and are therefore unimportant. Conceding that the exceptions to the general class, and the question arising upon the affidavits of newly discovered evidence, should all be ruled in favor of appellants' contention, we should even then find ourselves precluded by §670 Burns 1894, §658 R. S. 1881 and Horner 1897, from disturbing the judgment, since the facts found, and the evidence in support thereof, clearly show that the merits of the cause have been fairly tried and determined in the court below. *LaPlante v. State, ex rel.*, 152 Ind. 80.

Judgment affirmed.

Baker, J., took no part in the decision of this cause.

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ROWLAND v. CITY OF GREENCASTLE.

[No. 18,882. Filed January 7, 1902.]

**MUNICIPAL CORPORATIONS.**—*Ordinance Prohibiting Sale of Intoxicating Liquors From Residence District.*—Under subdivision 13 of §3541 Burns 1902, authorizing the common council of a city to regulate places where intoxicating liquors are sold, and to exclude such sales from the suburban or residence portion of the city, the common council may fix and declare the boundaries of the business district of a city in an ordinance excluding the sale of intoxicating liquors from the suburban or residence portion. pp. 593-596.

**SAME.**—*Sale of Intoxicating Liquors in Residence District in Violation of Ordinance.*—*Evidence.*—On the trial of an action by a city charging defendant with the violation of an ordinance prohibiting the

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sale of intoxicating liquors in the residence portion of such city, the ordinance is *prima facie* evidence as to what is the residence and what the business portion of the city, but other evidence may be admitted to show that the place of sale by defendant was in fact in the business portion. *p. 596.*

**MUNICIPAL CORPORATIONS.—Designating Locality in City Where Liquor May be Sold.**—Subdivision 13 of §3541 Burns 1901, providing that the common council of a city, in licensing and restraining places for the sale of intoxicating liquors, shall have the power to designate the room, building or structure where such liquors may be sold, does not empower the common council to fix conclusively the localities in which intoxicating liquors may be kept for sale to be used upon the premises. *p. 597.*

**PLEADING.—Answer.—Ordinance.**—Where an ordinance is properly brought into a case by a complaint to recover a penalty for the violation thereof, such ordinance may be considered in determining the sufficiency of an answer though not set out therein. *p. 598.*

**MUNICIPAL CORPORATIONS.—Proof of Publication of Ordinance.—When Not Necessary.**—In an action to recover penalty for violation of a city ordinance, it is not necessary to prove publication of the ordinance where such publication was not contradicted by affidavit. *p. 599.*

**SAME.—Proof of Publication of Ordinance.**—The introduction in evidence of a printed copy of an ordinance, with the affidavit of the printer, his foreman or clerk, or any competent witness, stating the fact of its publication and the dates thereof, is a sufficient proof of publication. Proof of filing affidavit of publication in clerk's office is not necessary. *p. 599.*

From Putnam Circuit Court; *S. M. McGregor*, Judge.

Action by city of Greencastle against Daniel B. Rowland to recover penalty for violation of city ordinance. *Reversed.*

*H. C. Lewis, B. F. Corwin, J. E. Lamb, J. T. Beasley, W. W. Woollen and Evans Woollen*, for appellant.

*T. T. Moore, G. C. Moore and J. S. McClary*, for appellee.

**DOWLING, J.**—This action was commenced before the mayor of the city of Greencastle. The complaint charged the appellant with keeping and maintaining a room for the sale of spirituous and other intoxicating liquors to be used upon the premises where sold, within the residence or suburban

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portion of the said city, and outside of the boundaries of the business district thereof, in violation of an ordinance of said city adopted February 8, 1898. From a judgment against him in the mayor's court, the defendant appealed to the Putnam Circuit Court. A plea in abatement was held insufficient. A demurrer to the complaint and a motion to strike out parts of it, were overruled. An answer in denial, together with four special answers, were filed by the defendant. Demurrers to the *second, third, fourth, and fifth* paragraphs of answer were sustained. A trial in the circuit court resulted in a finding and judgment against the defendant. Errors are assigned upon the rulings of the circuit court on the demurrers to the pleadings, and on the motion for a new trial.

The proper construction of the act of 1895 (Acts 1895, p. 180, §3541 Burns 1901, spec. 13), by which the ordinance is supposed to be authorized, and the validity of the ordinance itself, are the principal questions to be determined on this appeal.

The act referred to provides that the common council shall have power to enforce ordinances. "(13) To license, regulate, and restrain all shops, inns, taverns, or other places where intoxicating liquors are kept for sale, to be used in and upon the premises, and in regulating, restraining and licensing such inns, taverns, shops or places aforesaid, they shall have the power to designate the room, building or structure where such liquors may be sold, and may exclude such sales from the suburban or residence portion of such city, and confine the places where such sales may be made, to the business portion of such city, and may direct the arrangement and construction of the doors, windows and openings of the particular room in such building where such sales may be had, or such intoxicating liquors be drunk, and may direct the location, arrangement and construction of the bar kept therein, and the interior arrangement and construc-

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*Rowland v. City of Greencastle.*

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tion of such room, and may direct what games may be carried on therein, and may forbid the keeping or use of wine rooms."

In pursuance of the authority understood to be conferred upon it by this statute, the common council of the city of Greencastle, on February 8, 1898, enacted the following ordinance:

"Section 1. Be it ordained by the common council of the city of Greencastle, Indiana, that the business portions of said city of Greencastle, Indiana, are hereby defined to be and declared to exist only within the territory included within the following boundaries, to wit: All that part of said city which is bounded on the north by Columbia street of said city, on the west by Market street, on the south by Walnut street, and on the east by College avenue street of said city. All the residue of the territory of said city is hereby declared to be residence or suburban portions thereof, and the sale or keeping of intoxicating liquors for sale to be used in and upon the premises is hereby prohibited, within said residence or suburban portion \* \* \* under the penalties hereinafter prescribed."

"Section 3. And be it further ordained by the common council of the city of Greencastle, Indiana, that it shall be and is hereby made unlawful for any person or persons, or corporation, to keep or maintain any place, shop, room, or building for the sale, bartering or giving away, or the keeping of any spirituous, vinous, malt or other intoxicating liquors to be used in and upon the premises where sold, bartered or given away, at any point or place within said suburban or residence portion of said city of Greencastle, Indiana, as defined in the first section of this ordinance; but the keeping or maintaining of all such places is hereby confined to said business portions of said city, as herein defined in the first section of this ordinance; and any person violating any of the provisions of this section, or of any other section of this ordinance, shall, on conviction of such offense before

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the mayor of said city be fined in any sum not less than \$10 nor more than \$100, for each such offense, and no license from Putnam county, Indiana, or said city of Greencastle, Indiana, to sell intoxicating liquors shall constitute a defense to any action founded on this ordinance."

A fourth section of the ordinance declared it unlawful to keep or maintain any room, etc., for the keeping, etc., of intoxicating liquors to be used upon the premises where sold, within the suburban portion of the city of Greencastle, as defined in the first section of the ordinance, and affixed a penalty for any violation of said section four.

The trial court held the ordinance valid, and the complaint sufficient. It decided, also, upon the pleadings and proof, that the defendant had no right to show, by way of defense, that his saloon was not in the residence or suburban portion of the city, but, in fact, in the business portion, although not within the boundaries of that district, as declared by the ordinance.

In regulating, restraining, and licensing places where intoxicating liquors were kept for sale to be used upon the premises, the act of 1895 authorized the common council to exclude such sales from the suburban or residence district, and to confine the places where such sales might be made to the business portions of such city. The statute did not require the common council to fix the boundaries of the business portion of the city, neither did it prohibit them from doing so. It may have been thought by the legislature that, in some cases, it would be practicable to define such boundaries, and that in others it would not. Very good reasons may be given in support of each of these methods. It may be said that the question of the boundaries of the business district should be left to the determination of the courts as a question of fact. Or, with equal force, it may be contended that greater certainty and uniformity in the enforcement of the ordinance can be secured where such boundaries are previously established and made known. Neither of these



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methods seems to be objectionable upon any legal ground, and the common council of the city of Greencastle, in the exercise of its discretion, had the right to adopt either. It saw fit to fix and declare the boundaries of the business portion of the city of Greencastle; and to confine the places where intoxicating liquors might be kept for sale to be used upon the premises within such boundaries, excluding them from both the suburban and the residence parts of the city.

But while the ordinance adopted by the common council of the city of Greencastle was valid, and, *prima facie*, rendered unlawful the maintenance of all shops, etc., kept for the sale of intoxicating liquors to be used upon the premises, outside of the business portion of the city, as defined by the ordinance, yet, we think that such declaration of the boundaries of the business portion of the city was not conclusive. The statute authorized the common council to confine such places to the business portion of the city and to exclude them from the suburban and residence portions. But that body could not, without exceeding its statutory authority, exclude such places from those portions of the city which were, in fact, neither suburban nor residence districts. Declaring them to be suburban or residence portions would not make them such. Proof of the passage of the ordinance and that the appellant's room or saloon was within the prohibited district was sufficient to make a *prima facie* case against him, but he had the right to show that his room or saloon was, in fact, in the business part of the city, and not in either the suburban portion or the residence portion.

It is proper to suggest in this connection that the words "residence", and "suburban", as used in the statute and ordinance, do not mean the same thing. The suburban portion of the city is the outlying part, that portion which is remote from the centre of trade and population, where the houses are, generally, more or less scattered, and where many of the improvements and advantages enjoyed by the central and more densely populated parts of the city are wanting.



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The suburban part of a city may be used for business, or it may be occupied by residences, or it may be used both for residence and business purposes. But in either case, police surveillance and protection are usually less thorough and efficient than in the central parts of the city, and, however occupied, the same reasons exist for excluding from such portion of the city places of resort, and offensive occupations which may breed disorder, and threaten the quiet and safety of the neighborhood.

It is not necessary for us to decide whether the grant of the general power "to license, regulate, and restrain all shops, inns, taverns, or other places where intoxicating liquors are kept for sale to be used in and upon the premises" authorized the common council to fix the location of such shops, etc. It is sufficient to say that in adopting the ordinance before us, the common council did not attempt to act under a general and unlimited power to fix the location of all such shops and places. They exercised only the more restricted authority expressly given by the statute to confine such sales to the business portion of the city, and to exclude them from the suburban and residence districts.

It is insisted that the power to fix, conclusively, the localities in which intoxicating liquors may be kept for sale, to be used on the premises, is conferred by that clause of the statute which provides, that "in regulating, restraining, and licensing such inns, taverns, shops, or places aforesaid, they shall have the power to designate the room, building, or structure where such liquors may be sold." In our opinion, the statute will not bear this construction. Under the laws of 1831, 1838, 1853, regulating the traffic in intoxicating liquors, the place where the liquors were to be kept and sold, was not required to be particularly described either in the petition of the applicant, or in the license issued to him. Such petition and license usually designated certain premises known as a certain lot, or a part of a lot, and the building situated thereon. The holder of the license was gener-

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ally understood to have the privilege of keeping for sale, and selling, intoxicating liquors, in any and all rooms, in any part of such building, on any floor, and in any yard or garden upon the premises described in the license. It was, we think, to prevent abuses of this nature, and to restrict the business of the person to whom the license was issued to a single room, in a particular structure or building, that the law was changed so as to empower the common council to designate the room, building, or structure, in which the person receiving a license might carry on his business. This designation is accomplished by requiring the applicant for license to describe in his petition the particular room, building, or structure, and by issuing the license to keep for sale and sell intoxicating liquors in such room, building, and structure only. The construction contended for by the appellee would authorize the adoption of an ordinance requiring all intoxicating liquors kept and sold for use on the premises by all persons engaged in the business, to be so kept and sold in one or more designated rooms, buildings, or structures in the city, not owned by, or accessible to, such persons. An ordinance of this character would operate, not to regulate or restrain the traffic, but to prohibit it, and this the common council, in this manner, cannot do. As a further answer to the contention of the appellee, it may be said that no effort is made by the ordinance on which this action is founded to designate any room, building, or structure in which intoxicating liquors must be kept and sold; but that the common council do describe a locality, under the authority given them by another different and distinct clause of the statute.

A few minor questions remain to be disposed of. The appellee makes the point that the ordinance alleged to have been violated was not properly set out in the answers, and that we cannot consider it in deciding the question of the sufficiency of those answers. The ordinance was the foundation of the action, and was brought into the

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case for all purposes by the complaint. It is true that, by reason of the express provision of the statute, no copy of the ordinance need be filed, and that a recital in the complaint of the number of the section charged to have been violated, with the date of the adoption of the ordinance, is sufficient. §3501 Burns 1901, §3066 R. S. 1881 and Horner 1897; *Shea v. City of Muncie*, 148 Ind. 14. But the effect of this provision is that the ordinance, by reference, is made a part of the complaint as fully as if a copy were filed.

The publication of the ordinance was not contradicted by affidavit; hence, it was not necessary to prove the fact. §3499 Burns 1901; *Lake Erie, etc., R. Co. v. City of Noblesville*, 16 Ind. App. 20; *Green v. City of Indianapolis*, 25 Ind. 490.

If the publication of the ordinance had been properly put in issue, the introduction by the appellee of the printed copy of the same, with the affidavit of the printer, his foreman, or clerk, or any competent witness, stating the fact of its publication, and the dates thereof, was sufficient. §489 Burns 1901, §481 R. S. 1881 and Horner 1897. We know of no rule requiring proof of the filing of such affidavit of publication in the office of the city clerk, and we have been referred to none.

For the errors of the court in sustaining the demurrer to the *fifth* paragraph of the answer, and in excluding the evidence offered by the appellant that his place of business was not, in fact, within the residence or suburban portions of the city of Greencastle, and in overruling appellant's motion for a new trial on that ground, the judgment is reversed, with directions to overrule the demurrer to the *fifth* paragraph of the answer, and to sustain the motion for a new trial, and for further proceedings in conformity to this opinion.

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157	600
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161	376
162	464

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## LAKE ERIE AND WESTERN RAILWAY COMPANY v. WATKINS.

[No. 19,729. Filed January 7, 1902.]

**APPEAL AND ERROR.—Term Time Appeal.—Abandonment.**—Where a party in term time asks and is granted an appeal but does not file a transcript of the proceedings of the lower court in the office of the Clerk of the Supreme Court, within sixty days after filing the appeal bond, as required by §650 Burns 1901, he will be deemed to have abandoned his term time appeal. *pp. 602, 603.*

**SAME.—Time of Taking Appeal.**—An appeal will be deemed to have been taken at the time of the filing of the transcript and assignment of errors in the Supreme Court. *p. 603.*

**SAME.—Repeal of Appealing Statute.**—Prosecuting an appeal to the Supreme or Appellate Court cannot be said to be the institution of a suit within the meaning of §248 Burns 1901, providing that no suits instituted under existing laws shall be affected by the repeal thereof. *pp. 603, 604.*

**SAME.—Repeal of Appealing Statute.**—An appeal from a judgment against a railroad company for stock killed is not for the recovery of any penalty or for the enforcement of any liability within the meaning of §248 Burns 1901, providing that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, but the same shall be treated as remaining in force for the enforcement of such penalty, forfeiture or liability. *pp. 604, 605.*

**SAME.—Vested Rights.**—A party who institutes or defends a suit or action does not thereby acquire a vested right to a decision from a particular court or tribunal within the meaning of the provision of §248 Burns 1901, that "No rights vested, or suits instituted, under existing laws shall be affected by the repeal thereof," etc. *p. 605.*

**SAME.—When No Appeal Lies.—Action Within Jurisdiction of Justice of the Peace.**—Under §5318 Burns 1901, giving justices of the peace exclusive original jurisdiction in actions against railroad companies for stock killed when the damages do not exceed \$50, and concurrent jurisdiction with the circuit court when they exceed that amount, an appeal from a judgment for \$70 in such action is within the prohibition of §6 of the act of 1901 (Acts 1901, p. 565), providing that, except in certain cases specified in §8 thereof, no appeal shall be taken to the Supreme or Appellate Court in any civil case which is within the jurisdiction of a justice of the peace. *pp. 605, 606.*

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**APPEAL AND ERROR.**—*When no Appeal Lies.*—*Action Within Jurisdiction of Justice of the Peace.*—*Statute.*—The provision of §6 of the act of 1901 (Acts 1901, p. 565), denying appeals to the Supreme or Appellate Court in civil cases within the jurisdiction of a justice of the peace, except as provided in §8 thereof, applies to appeals from judgments rendered before the act took effect but taken thereafter. pp. 606, 607.

**SAME.**—*Right of Appeal.*—*Limitation.*—*Constitutional Law.*—Under §4, article 7, of the Constitution, providing that "The Supreme Court shall have jurisdiction coextensive with the limits of the State in appeals and writs of errors, under such regulations and restrictions as may be prescribed by law" the legislature may not only, from time to time, enlarge such jurisdiction, but it may also contract the same as public policy may demand or require, and may designate the amount that may authorize an appeal, and, within reasonable limits, prescribe the class of cases in which appeals can be taken, and from what courts or tribunals they may be prosecuted. pp. 607, 608.

**SAME.**—*Right of Appeal.*—*Limitation.*—*Constitutional Law.*—The provision of §12 of the bill of rights that "all courts shall be open," etc., is fully satisfied by a trial in a court of competent jurisdiction in which the right to a jury, in proper cases, as guaranteed by the Constitution, is afforded. p. 608.

From Delaware Circuit Court; *J. G. Lefler*, Judge.

Action by J. H. Watkins against the Lake Erie and Western Railroad Company for a horse killed by defendant's cars. From a judgment for plaintiff in the circuit court for \$70, affirming a judgment rendered before a justice of the peace, defendant appeals. *Appeal dismissed.*

*J. B. Cockrum, R. S. Gregory, A. C. Silverburg* and *O. J. Lotz*, for appellant.

*J. W. Ryan, W. A. Thompson, W. M. Mann* and *L. Lesh*, for appellee.

**JORDAN, C. J.**—This case has been transferred by the Appellate to the Supreme Court in order that the latter may pass upon appellee's motion to dismiss the appeal, in opposing, which motion, appellant raises the constitutional validity of §6 of an act of the legislature "concerning appeals", approved March 12, 1901, which was in full force

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from and after that date by virtue of the emergency therein declared. Acts 1901, p. 565. Section 6 of the act being §1337f Burns 1901, reads as follows: "No appeal shall hereafter be taken to the Supreme Court or to the Appellate Court in any civil case which is within the jurisdiction of a justice of the peace except as provided in section eight of this act." Section 8 of the act being §1337h Burns 1901, wherein the exceptions referred to in §6 are reserved, is as follows: "Every case in which there is in question, and such question is duly presented, either the validity of a franchise, or the validity of an ordinance of a municipal corporation or the constitutionality of a statute, State or federal, or the proper construction of a statute, or rights guaranteed by the State or federal Constitution, and which case would be otherwise unappealable by virtue of section six or section seven shall be appealable directly to the Supreme Court, for the purpose of presenting such question only."

The record discloses that appellee commenced this action before a justice of the peace, under the statute which renders railroad companies liable for the killing or injuring of stock, §§5312, 5313 Burns 1901, §§4025, 4026 Horner 1897, to recover for a horse killed by the cars of appellant at a point on its railroad track where its right of way was not securely fenced. A trial before the justice resulted in a recovery in favor of the appellee, and thereupon appellant appealed from the judgment to the Delaware Circuit Court, where a trial resulted in the rendition of a judgment on January 23, 1901, in favor of appellee, for \$70 and costs. From this judgment appellant on the same day prayed an appeal to the Appellate Court, which was granted on condition that it file its appeal bond in the sum of \$200 within twenty days, with certain sureties named and approved by the court. On January 28, 1901, appellant filed its appeal bond. On the 3rd day of May, 1901, it filed a transcript of the proceedings of the lower court, together with its assign-

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ment of errors in the Appellate Court. The transcript not having been filed in the office of the Clerk of the Supreme Court within sixty days after filing the appeal bond as required by §650 Burns 1901, appellant must be deemed to have abandoned the term time appeal which it originally undertook to prosecute. See, *McKinney v. Hartman*, 143 Ind. 224; Rule number one of this and Appellate Court; Ewbank's Manual, §102.

Appellant after having abandoned the term time appeal in question, on May 3, 1901, nearly two months after the taking effect of the act of 1901, attempted to take what is commonly denominated a vacation appeal. If the case is appealable under any law in force at the date of filing the transcript in the Appellate Court, then such appeal must be held and deemed to have been taken on May 3, 1901, the time of the filing of the transcript and assignment of errors. Rule number one of this and Appellate Court; Ewbank's Manual, §102.

The motion to dismiss the appeal states the following reasons: "(1) The cause is not one in which an appeal lies to this court; (2) the court has no jurisdiction of the subject-matter of this action; (3) the cause in which this appeal is attempted to be taken was and is one within the jurisdiction of a justice of the peace, and does not involve the validity of a franchise, or the validity of an ordinance of a municipal corporation, nor does it in any way or manner involve the constitutionality of a statute, State or federal, or rights guaranteed by the State or federal Constitution."

It will be observed that the motion negatives all of the exceptions embraced in §8, *supra*, except that relating to the proper construction of a statute. Counsel for appellant contend that their client has the right to prosecute this appeal for several reasons: (1) Because by §§243, 248 Burns 1901, its right to appeal is not affected by §6 of the act of 1901; (2) that the appeal involves the construction of a



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statute, and is, therefore, within the exception of §8; (3) that the act is not retroactive and does not apply to pending litigations. Finally, it is insisted, in effect, that under the construction of this statute appellant's right to an appeal is protected, and therefore the act of 1901, so far as it attempts to deny this right, is unconstitutional and void.

Section 243 Burns, *supra*, provides: "No rights vested, or suits instituted, under existing laws shall be affected by the repeal thereof, but all such rights may be asserted, and such suits prosecuted, as if such laws had not been repealed."

Section 248 Burns, *supra*, provides: "Whenever an act is repealed which repealed a former act, such act shall not thereby be revived, unless it shall be so expressly provided. And the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

It is certainly too clear for successful argument that neither of these sections has any application to the question here involved. The provisions therein are not designed in any manner to apply to any right of appeal to either the Appellate or Supreme Court that might be cut off or destroyed by the repeal of a statute. The first section above set out refers to rights that had become vested under existing laws and to suits instituted in the lower courts. These rights and the prosecution of such suits this section declares shall not be affected by the repeal of such existing laws. Prosecuting an appeal to either the Supreme or Appellate Court certainly can not be said to be the institution of a suit within the meaning of §243. It is equally evident that such an appeal is not for the recovery of any penalty or for the enforcement of any liability as mentioned in §248, *supra*. That a party to a suit or action has no vested right to appeal



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or prosecute a writ of error from one court to another, in the absence of constitutional protection in that respect, is a well settled proposition. Neither by instituting nor by defending an action or a suit does a party thereby acquire a vested right to a decision from a particular court or tribunal. This doctrine, so universally asserted and supported by the authorities, is but an affirmation or extension of the familiar principle that there is no vested right in a remedy. *Bailey v. Kincaid*, 57 Hun 516, 11 N. Y. Supp. 294; *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231; *Dismukes v. Stokes*, 41 Miss. 430; *Mayne v. Board, etc.*, 123 Ind. 132; *Branson v. Studabaker*, 133 Ind. 147; *Hughes v. Parker*, 148 Ind. 692; *Sims v. Hines*, 121 Ind. 534; *Ryan v. Waule*, 63 N. Y. 57; *Sullivan v. Haug*, 82 Mich. 543, 46 N. W. 795, 10 L. R. A. 263; Elliott's App. Proc. §§75, 76, 354; 2 Ency. of Law and Proc. p. 507; Cooley's Con. Lim. pp. 469, 472, 473; 2 Ency. Pl. and Pr., 19; *Southern, etc., R. Co. v. Thompson*, 27 Ind. App. —.

In *Sullivan v. Haug, supra*, the court said: "The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the legislature may in its discretion grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken."

Under §5313 Burns 1901, §4026 Horner 1897, a court of a justice of the peace has exclusive original jurisdiction when the damages for stock killed or injured do not exceed \$50, and concurrent jurisdiction with the circuit court when they exceed that amount. Consequently this appeal falls fully within the prohibition of §6, *supra*. Unless the appeal comes within some of the exceptions of §8, or unless the provision of §6 is invalid by reason of its being antagonistic to the State's Constitution, the motion to dismiss the

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appeal must be sustained. There is no question relating to the proper construction of a statute presented under the facts and no contention advanced or claim made that it falls within any of the other exceptions enumerated in §8. Counsel for appellant argue that the provision denying appeals in the section in question is prospective, and not retroactive, and inasmuch as the judgment from which it seeks to appeal was rendered and a term time appeal prayed and granted before the passage of the act of 1901, hence, it is contended that the act can not be said to apply to this appeal. The language of §6 is: "No appeal *shall hereafter* be taken". (Our italics). By the use of the word "hereafter" it is clear that the law was intended to apply only to appeals taken after it went into effect, and not to those that had been perfected and were actually pending at the time the act went into force. But this contention can not avail appellant. Had it perfected its term time appeal by filing the transcript in the office of the Clerk of the Supreme Court, as we may assume it might have done, before the 12th day of March, 1901, it would then be in a position to contend that its appeal was not affected by the statute. But as previously shown, under the facts, it abandoned the steps which it had begun towards prosecuting a term time appeal, and attempted to take a vacation appeal long after the statute was in full force and effect. No sufficient reason or argument can be advanced for claiming that the law in question is not intended to apply to appeals from judgments rendered before it went into effect, but taken thereafter. The question as to whether the judgment from which the appeal is attempted to be taken was rendered before or after the time when the statute became effective is not a feature of the law. By the plain letter thereof it was intended to forbid the taking of any and all appeals within the class mentioned and not within some of the exceptions named in §8, after it went into effect, regardless of the time when the judgment from which the appeal is attempted to be taken was rendered. In support of appellant's contention that, in so far as the stat-

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ute can be said to deny its right of appeal under the facts in this case it is invalid, we are referred to §4, article 7, of our Constitution, and to §12 of its bill of rights. Section 4 is as follows: "The Supreme Court shall have jurisdiction coextensive with the limits of the State in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the General Assembly may confer."

Section 12 of the bill of rights, provides as follows: "All courts shall be open; and every man, for injury done to him in his person, property, or reputation shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

The creation of a Supreme Court by the Constitution is at least an implied declaration of that instrument that the right of appeal in some class of cases shall exist. An examination of §4, of article 7 discloses that it does not define or mention the class of cases in which the Supreme Court shall have appellate jurisdiction. It is therein declared that this court shall have such jurisdiction "under such regulations and restrictions as may be prescribed by law". While it is certainly true that the legislature under this provision of our fundamental law is not authorized to deprive the Supreme Court entirely of its appellate jurisdiction, still the legislature may not only from time to time enlarge such jurisdiction, but it may also contract the same as public policy may demand or require. It may designate the amount that may authorize an appeal, and, within reasonable limits, it may prescribe the class of cases in which appeals can be taken, and from what courts or tribunals they may be prosecuted. The policy of the framers of our Constitution seems to have been not to prescribe absolutely the boundaries or limits of the jurisdiction of our courts, but to allow a legislative discretion in that respect in order that the varying demands and changing necessities of the people might be satisfied. See, *Branson v. Studabaker*, 133

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Ind. 147, and authorities there cited; *People v. Richmond*, 16 Col. 274, 26 Pac. 929; *McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287; 2 Ency. Pl. and Pr. pp. 14, 19, and the many authorities hereinbefore cited.

Section 12 of the bill of rights providing that "All courts shall be open," etc., is fully satisfied by a trial in a court of competent jurisdiction in which the right to a jury, in proper cases, as guaranteed by the Constitution, is afforded.

It follows, and we so adjudge, that the provision of the statute denying this appeal is, under the Constitution, a valid exercise of legislative power. The appeal under the facts being forbidden by the statute, the motion to dismiss is therefore sustained.

Appeal dismissed at the cost of appellant.

## THE STATE v. VAN CLEAVE.

[No. 19,158. Filed January 8, 1902.]

157	608	COURTS.— <i>Rules.</i> — <i>Appeal and Error.</i> — <i>Transcript.</i> —Courts have the inherent power to ordain such rules as they may find necessary to a proper dispatch of business, and, when once established, they become invested with the force and effect of law. pp. 608, 609.
158	38	
157	608	APPEAL AND ERROR.— <i>Record.</i> — <i>Marginal Notes.</i> —The right to invoke the rule of the Supreme Court in reference to marginal notes on the transcript on appeal is not confined to the appellee, but the court may of its own motion enforce the rule by dismissing the appeal. p. 609.
162	484	
157	608	From Parke Circuit Court; A. F. White, Judge.
165	200	
157	608	Elijah L. Van Cleave was tried on the charge of producing an abortion. From a judgment acquitting defendant, the State appeals on reserved questions of law. <i>Appeal dismissed.</i>
171	88	

From Parke Circuit Court; A. F. White, Judge.

Elijah L. Van Cleave was tried on the charge of producing an abortion. From a judgment acquitting defendant, the State appeals on reserved questions of law. *Appeal dismissed.*

J. M. Johns and W. L. Taylor, Attorney-General, for State.

S. D. Puett and J. S. McFaddin, for appellee.

HADLEY, J.—Rule thirty-one of this court, in force at the time the transcript in this case was filed (1899), is as fol-

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lows: "The appellant shall cause the transcript to be paged and the lines of each page to be numbered. He shall also cause marginal notes to be placed on the transcript in their appropriate places, indicating the several parts of the pleadings in the cause, the exhibits, if any, the orders of the court, and the bills of exceptions. Where the evidence is set out by deposition or otherwise, the names of the witnesses shall be stated in the margin. The appellant shall also note on the margin all motions and rulings thereon, and he shall also note the instructions given and refused in all cases where questions are made thereon." (Rule 3, 1900.)

The requirements of this rule, with respect to the marginal notes, have been wholly ignored. The record embraces divers pleadings, exhibits, motions, orders of court, rulings, and bills of exception, and not a note anywhere in the body of the transcript to indicate where any particular matter may be found. Courts have the inherent power to ordain such rules as they may find necessary to a proper dispatch of business, and when once established they become invested with the force and effect of law. *Smith v. State, ex rel.*, 140 Ind. 340. The right to invoke the benefit of the rule is not confined to the appellee, but this court, charged with the duty of expediting the business before it, may of its own motion enforce it as we do in this case. We are required and expected rightly to apprehend the entire record, and accurately to discover that which will support, as well as that which will subvert, the judgment. To do this it often becomes necessary to make frequent references to the transcript, and when unaided by marginal notes much time is often consumed in finding the things sought. Public interest as well as the rights of appellees call for a strict enforcement of this rule. *Smith v. State, ex rel.*, 137 Ind. 198; *Egan v. Ohio, etc., R. Co.*, 138 Ind. 274; *Ewbank's Manual*, §119; *Elliott's App. Proc.*, §204.

Appeal dismissed.

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 North v. Davisson.
 

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157	610
158	228

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159	373

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163	478

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168	656

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170	549

157	610
171	463

## NORTH v. DAVISSON ET AL.

[No. 19,334. Filed January 8, 1902.]

**APPEAL AND ERROR.—Parties.—Drains.**—Where, in an appeal from a judgment establishing a drain, all the parties to the judgment, adverse to appellant, are not made parties to the appeal, the appeal will be dismissed.

From Kosciusko Circuit Court; *H. S. Biggs*, Judge.

Petition by Wm. C. Davisson and others for the construction of a drain. From a judgment establishing the drain, Samson J. North, the remonstrant, appealed. *Appeal dismissed.*

*L. W. Royse* and *B. Shane*, for appellant.

*L. R. Stookey* and *A. F. Biggs*, for appellees.

BAKER, J.—Petition for the construction of a ditch, by William C. Davisson, Jacob Tusing and ten others. Viewers were appointed by the board of commissioners, who reported in favor of the construction. Appellant, Samson J. North, remonstrated. Reviewers were appointed, who confirmed the report of the viewers, with few alterations. Appellant appealed to the circuit court. Trial by the court, and from the judgment establishing the ditch this appeal is taken.

It is shown by the record that all of the petitioners were parties to the judgment from which this appeal was taken. In the assignment of errors, Jacob Tusing, one of the petitioners, has not been made a party; and over him this court has no jurisdiction. We can not, therefore, determine this cause upon its merits. *Ex parte Sullivan*, 154 Ind. 440, and cases cited.

Appeal dismissed.

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State v. Comer.

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**THE STATE v. COMER.**

[No. 19,668. Filed January 9, 1902.]

**CONSTITUTIONAL LAW.—*Self-Incrimination.***—The fifth amendment of the Constitution of the United States, providing that “no person in any criminal case shall be compelled to testify against himself,” has no application to the states. *p. 613.*

**WITNESSES. — *Self-Incrimination Before Grand Jury.***—Although a witness cannot be compelled, while before a grand jury, to testify to matters which would tend to criminate himself, yet if he does so testify without objection he will be deemed to have done so voluntarily. *p. 613.*

**GRAND JURY.—*Examining Witnesses.***—The grand jury examining a witness under oath need not inform such witness of his constitutional privilege to refuse to testify in matters tending to criminate himself. *p. 614.*

**PLEADING.—*Abatement.***—Pleas in abatement must be certain and definite, and must anticipate and exclude all such supposable matter as would, if alleged by the opposite party, defeat his plea. *p. 614.*

**CRIMINAL LAW.—*Plea in Abatement.***—Defendant’s plea to an indictment, that he was summoned before the grand jury and was compelled to testify as to facts concerning a crime with which he was charged, and that at the time he testified he was not informed and did not know that he had a legal right to refuse to testify against himself, and that the indictment was returned on defendant’s own testimony, was not a good plea in abatement, since the statements that he was compelled to testify and that the indictment was returned on his own testimony were mere conclusions. *p. 615.*

From Clinton Circuit Court; *J. V. Kent*, Judge.

James Comer was indicted for selling his vote, and from a judgment discharging defendant, the State appeals. *Reversed.*

*W. L. Taylor*, Attorney-General, and *A. L. McGuire*, for State.

*Dallas Holman*, for appellee.

**MONKS, J.**—Appellee was charged by indictment with selling his vote, in violation of §1, Acts 1899, p. 381, being §2329 Burns 1901. Appellee filed a plea in abatement to

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the indictment, to which plea appellant demurred for want of facts. The court overruled the demurrer, and appellant filed a reply in two paragraphs. A demurrer for want of facts to each paragraph of reply was sustained, and final judgment rendered discharging appellee. The errors assigned call in question the action of the court in overruling appellant's demurrer to the plea in abatement, and in sustaining appellee's demurrer to each paragraph of reply.

The part of the plea in abatement essential to the determination of the questions presented is as follows: "That the grand jury of said county were informed and believed that appellee had before that time, at the general election of 1900, sold his vote; that for the purpose of obtaining evidence against appellee in said matter, and for the purpose of securing an indictment against appellee for said supposed violation of said election law, the grand jury caused a subpoena to issue directing the sheriff of said county to summon appellee before the grand jury to answer such questions as might be propounded to him by the said grand jury; that the sheriff of said county served said subpoena on appellee, who went before the grand jury; that appellee was then sworn, and, while under oath, was interrogated by the grand jury and was then and there by said grand jury compelled, forced, and caused involuntarily to testify in answer thereto to matters and facts concerning said crime of vote selling committed by him; that at the time he testified before said grand jury he was not informed by any one, and did not know, that he had the legal right to refuse to testify or give to said grand jury any evidence concerning his supposed connection with or commission of said acts in violation of the election law he was suspicioned by said jury to have committed, and if at said time he had had such information and knowledge he would not have testified before said grand jury about said facts nor given said jury any testimony or evidence in relation thereto; that the indictment was returned upon the testimony so given by appellee."



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The fifth amendment of the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself"; and §14 of article 1 of the Constitution of this State provides that "no person in any criminal case shall be compelled to testify against himself". It is claimed "that the facts alleged in said plea were sufficient to abate said action, because said plea shows that appellee was deprived of a right guaranteed by the State and federal Constitution". This appeal was taken under §8, Acts 1901, p. 566, being §1337h Burns 1901, for the purpose of presenting that question.

It has been uniformly held that the fifth amendment of the Constitution of the United States operates exclusively in restriction of federal power, and has no application to the states. *Thorington v. Montgomery*, 147 U. S. 490, 492, 13 Sup. Ct. 394, 37 L. Ed. 252; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 158, 17 Sup. Ct. 56, 41 L. Ed. 369; *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; *Barron v. Baltimore*, 7 Pet. (U. S.) 243, 247, 8 L. Ed. 672. It is evident, therefore, that said fifth amendment of the Constitution of the United States has no application to this case.

Being subpœnæd, and appearing before the grand jury and being sworn, was not a violation of appellee's constitutional rights, and while before the grand jury he could be compelled to testify to any matter which did not criminate him. Under the provision of the Constitution of this State above quoted, he could not, however, be compelled to testify before the grand jury to any matter that would criminate him. Whether he should so testify was, therefore, a personal privilege which he could claim or not as he chose. If he gave such criminating evidence voluntarily, his constitutional rights were not violated. It is a general rule that when a personal privilege exists for a witness to testify or not as he chooses, if he does testify without objection he will be deemed to have done so voluntarily.

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It is alleged in the plea that the grand jury compelled and forced him involuntarily to testify to facts criminating himself. This is a mere conclusion. The rules of pleading require that facts, and not conclusions, be alleged. The grand jury cannot compel a witness to testify before that body. This can only be done by the court in which said grand jury is impaneled, under the provision of §§1733, 1734 Burns 1901. The averments of said plea do not show that appellee was *compelled* to answer any question or give any evidence before the grand jury. It is alleged that appellee was ignorant of his right to refuse to testify, and that the grand jury did not inform him that he had such right. The statutes of this State impose no such duty on the grand jury. Everyone is presumed to know the law, and that body had the right to act on the presumption that appellee knew that he could not be compelled to testify to any matter which would criminate him. Appellee was not in custody, or under bond for his appearance to answer a charge of selling his vote, and no such charge was pending against him.

It is alleged that "said indictment was returned upon the testimony given by appellee." Even if material this is only a conclusion of the pleader. The facts from which the pleader drew this conclusion should have been alleged. In this State, if a grand juror has personal knowledge of the commission of a public offense triable in the county, he must declare the same to his fellows, and an indictment may be found thereon, the same as on the testimony of any other witness. §1729 Burns 1901; 17 Am. & Eng. Ency. of Law (2nd ed.) 1284; Thompson & M. on Juries, §644.

The rule is that pleas in abatement must be certain to every intent and in every particular, and leave nothing to be drawn by inference; they must anticipate and exclude all such supposable matter as would, if alleged by the opposite party, defeat his plea. *Needham v. Wright*, 140 Ind. 190, 194, 195; 1 Chitty on Pl. (9th Am. ed.) 462, 473, Ste-

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phens on Pl. (9th Am. ed.) 352, 431. Under this rule the plea in abatement was clearly insufficient.

Moreover, it has been held in this State that when an indictment has been returned into open court by the grand jury, duly indorsed by the foreman, it is conclusive evidence of the regularity of the finding, and that the proper number concurred therein, and the same cannot be controverted by plea and it is not competent to inquire into the amount or kind of evidence upon which they acted. *Stewart v. State*, 24 Ind. 142; *Creek v. State*, 24 Ind. 151, 155, 156. See, also, *State v. Fasset*, 16 Conn. 457, 463, 467-473; *State v. Fowler*, 52 Iowa 103, 104, 2 N. W. 983; *State v. Boyd*, 2 Hill (S. C.) 288, 27 Am. Dec. 376; *Dockery v. State*, 35 Tex. Cr. 487, 489, 34 S. W. 281; *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270, 273-276.

The rule that the testimony of a petit juror will not be received to impeach his verdict extends also to a grand juror, so that the want of no fact essential to the finding and return of an indictment can be shown by the testimony of a grand juror. It is said in 1 Bishop's Crim. Proc. (4th ed.) §§874, 1270, on this subject: "So that the want of legal evidence to justify the finding of a bill, or the non-concurrence of a needful juror, or the lack of any other essential fact, cannot be shown in this way, [by the testimony of a grand juror] and no other is ordinarily practicable." Nor can the testimony of a third person as to what a grand juror said be received for such purpose. 1 Bishop's Crim. Proc. (4th ed.) §1270. Neither is a defendant permitted to show that the offense proved on the trial is not the same which was before the grand jury. 1 Bishop's Crim. Proc. (4th ed.) §872, cl. 6.

Judgment reversed, with instructions to sustain appellant's demurrer to the plea in abatement, and for further proceedings not inconsistent with this opinion.

157	616
165	708

157	616
167	601

## PAYNE v. TERRE HAUTE AND INDIANAPOLIS RAILWAY COMPANY.

[No. 19,768. Filed January 10, 1903.]

**APPEAL AND ERROR.**—*Transfer of Cause from Appellate to Supreme Court.*—Where the Supreme Court sustains a petition to transfer a cause from the Appellate Court, the decision of the Appellate Court is thereby vacated. p. 616.

**CARRIERS.**—*Injury to Passenger Riding on Pass. — Release.*—An action cannot be sustained by a passenger for injuries caused by the negligence of the carrier where the passenger was at the time of receiving the injury riding on a free pass which contained a stipulation releasing the carrier from such liability. pp. 616–620.

From Clay Circuit Court; *S. M. McGregor*, Judge.

Action by John R. Payne against the Terre Haute and Indianapolis Railroad Company for damages on account of personal injuries sustained. From a judgment for defendant, plaintiff appeals. *Affirmed.*

*E. S. Holliday, F. A. Horner and J. A. McNutt*, for appellant.

*J. G. Williams, G. A. Knight and D. P. Williams*, for appellee.

**BAKER, J.**—By sustaining appellee's petition for an order of transfer, this court has vacated the decision of the Appellate Court and has brought the cause here for final determination.

Appellant began this action to recover damages for personal injuries received by him through the negligence of appellee's servants while he was being carried as a passenger on one of appellee's regular passenger trains. Appellee answered that appellant paid no fare, but was traveling on a free pass, which was issued to him as a pure gratuity, and which contained a stipulation, agreed to by appellant, that "by its acceptance and use any and all claims for injuries to person or for loss or damage to baggage that might accrue to [appellant] are released". The court overruled appellant's demurrer to this answer. On appellant's refusal to

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plead further, judgment was rendered, from which this appeal is taken. The only question presented is the sufficiency of the answer.

Appellant is prosecuting this action in the face of his agreement not to do so. No allegations appearing to the contrary, presumably he was of sufficient capacity to make a binding contract. His contention, therefore, is that no one can lawfully make such a contract and be bound thereby. One who seeks to put a restraint upon the freedom of contracts must make it plainly and obviously clear that the contract in question is void. *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 62 Am. St. 503; *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560.

The only claim that this contract is void is that it is against public policy.

It is thoroughly established in this State, and generally elsewhere, that railroad corporations, as common carriers, are not permitted, by contracts with their customers, to exempt themselves from the consequences of their own negligence. *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126; *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 58 Am. St. 348; *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196; *Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305; *New York, etc., R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498.

The main underlying reasons are briefly these: Railroads, by reason of physical conditions, are natural monopolies. In most instances, the public are restricted to a choice of using a certain line or none. The corporations, created by the State, are granted special privileges, in return for which they are held, among other things, to undertake to use due care and diligence in transporting passengers and goods. They owe this duty to the public generally. They owe the further duty, as common carriers, to trans-

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port, on equal terms of service and compensation, all who apply. The person who is practically constrained to patronize a certain road and the corporation that operates the road are not on a footing of equality in contracting. If the corporation was permitted to impose, as one of the terms of the contract, a waiver of its negligence upon one customer, it could practically upon all, and thereby, while claiming the benefits of its franchise, evade the performance of a public duty which was one of the chief considerations of the grant. Therefore, it is held, a contract, by which a common carrier assumes to abandon a duty it owes to the public generally, is void as being against public policy.

In the Selby, Nickless, and Faylor cases, *supra*, the plaintiffs were traveling on passes which purported to release the companies from damages through their negligence, and the stipulations were held void. But the passes were "stock-drovers' passes", issued in connection with bills of lading for the shipment of live-stock which the plaintiffs were to accompany and care for. The usual rates were paid, and the court properly decided that the transaction was an entirety, that plaintiffs had paid for transportation of their persons as well as their stock, that the companies stood in the relation of common carriers for hire to plaintiffs as part of the general public, and that therefore the rule which forbade the companies to abandon a duty owing to the general public rendered the waiver void. But the statements in these cases to the effect that such a waiver in a free pass is unenforceable, were unnecessary to the proper decision of the issues presented, and are therefore not authoritative.

The precise question raised by this appeal has not heretofore been presented to this court, but the principles announced in the Keefer, Mahoney, and Russell cases, *supra*, are controlling. In these cases it is expressly declared to be a well-established rule that railroad companies, though public or common carriers, may contract as private carriers for the transportation of persons whom they are not bound as common carriers to receive. In the Keefer and Mahoney

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cases, the court held that railroad companies were not required, under the duties they owe to the general public, to carry express matter for express companies, that with respect to such transportation they were authorized to contract as private carriers, and that a waiver of liability for negligent injury of express messengers was enforceable. In the Russell case the same doctrine was applied to an action by a porter upon a Pullman sleeping car. These cases prove that private carriers, even for hire, may lawfully attach conditions of exemption for negligence to their contracts for carriage, and that the test whether a particular contract is that of a public or private carrier is whether the customer as one of the general public had the right to compel the carrier to undertake the transportation. As stated in the Russell case: "The inquiry remains, is the present contract of exemption invalid as being within the theory of the rule above explained? If it is, it must be by virtue of some positive statute, or because of the fact that it is an abandonment by the carrier of a public duty." There is no statute that affects the question. If express messengers and Pullman porters, who are on the trains in pursuance of their regular vocations and whose transportation is paid for, can not require railroad companies to carry them as a public duty, much less can holders of gratuitous passes. They are creatures of favoritism. They voluntarily separate themselves from the general public. They do not approach the companies as part of the general public, to be carried on the usual terms of service and compensation; and they are certainly under no compulsion to enter into the contract of exemption. The reasons on which is based the rule that public carriers will not be permitted to evade a public duty wholly fail, for railroad companies are under no obligation to transport the general public gratuitously.

The following cases are directly in point: *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 55 Am. Rep. 115, 26 Am. & Eng. R. Cas. 280; *Rogers v. Kennebec, etc., Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby*



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*v. Boston, etc., R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, 40 Am. & Eng. R. Cas. 693; *Kinney v. Central R. Co.*, 34 N. J. L. 513, 3 Am. Rep. 265; *Wells v. New, York, etc., R. Co.*, 24 N. Y. 181; *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. 901, 58 Am. & Eng. R. Cas. 546; *Muldoon v. Seattle, etc., R. Co.*, 10 Wash. 311, 45 Am. St. 787. These represent the decided weight of authority. The cases to the contrary may be found in the notes in the various annotated reports above referred to.

By analogy, the proposition that whoever for his own advantage or profit accepts free transportation must abide the conditions on which it is issued, is supported by the holding that one who purely for his own convenience uses a railroad track or yard for a passageway must take the license on the terms of risk with which it is granted. *Cannon v. Cleveland, etc., R. Co.*, *post*, 682.

Not only is no principle of public policy subverted by denying the holder of a free pass the right to repudiate his contract, but there is sound public policy in holding him to it. The expenses of operating railroads are borne by the general public,—that is, by the patrons who pay. In so far as persons stand aloof from the general public they increase the burden or at least postpone the day of lower rates. If the pass-takers, in addition, were allowed to recover judgments for personal injuries by disavowing their agreements, they would be making a positive increase of disbursements, to be borne ultimately by the general public.

And if it were held to be against public policy for railroad companies to issue free passes, of course the recipients who used them to secure carriage would have no standing to sue as passengers.

Judgment affirmed.

Jordan, C. J.—While I concur, with some doubts, in the judgment of affirmance, still I do not concur in all of the reasons and arguments contained in the opinion of the court.



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ALLEN v. HAMILTON ET AL.

[No. 19,112. Filed Oct. 24, 1901. Rehearing denied Jan. 14, 1902.]

APPEAL AND ERROR.—*Bill of Exceptions*.—A bill of exceptions containing the evidence must be filed with the clerk after being signed by the judge.

From Decatur Circuit Court; *Douglas Morris*, Judge.

Action by Caroline C. Allen against W. M. Hamilton and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

*C. Ewing, D. Wilson* and *M. D. Tackett*, for appellant.

*D. W. Howe, B. F. Bennett* and *T. E. Davidson*, for appellees.

JORDAN, J.—This action was instituted in the lower court by appellant whereby she sought to recover of appellees the sum of \$15,000 for the alleged wrongful conversion of certain bank stock. There was a trial by jury, and at the close of the evidence the court directed the jury to return a verdict in favor of the defendants, which was accordingly done, and over appellant's motion for a new trial judgment was rendered in their favor for costs. The only question discussed by the parties is the alleged error of the court in directing the jury, upon the evidence, to find for the defendants.

At the very threshold we are confronted with the contention of appellees' counsel, that the evidence given on the trial of this cause is not in the record. It appears that an attempt has been made to bring up the evidence under the provisions of an act of the legislature, concerning the appointment of shorthand court reporters, etc., approved March 3, 1899, Acts 1899, p. 384. In *Adams v. State*, 156 Ind. 596, we held that §6 of the latter act, which section, in the main, was designed to control the certification of the long-

157	621
161	121
157	621
165	241

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hand manuscript of the evidence to this court, on appeal, was invalid, and that the act approved March 8, 1897, Acts 1897, p. 244, was still in force, and controlled, in certifying to this court the original bill of exceptions embracing the evidence given upon the trial of a case together with the exceptions and objections thereto. In the case at bar appellant has even failed to comply with the requirements of §6 of the act of 1899, and if that section could be said to be valid, she would not be in a position to claim a substantial compliance with its provisions. She has also wholly neglected to comply with the requirements of the act of 1897, and hence it can not be said that the evidence is in the record by virtue of appellant having substantially complied with the provisions of the latter law. The clerk of the lower court certifies that the original transcript or manuscript of the evidence was filed in his office on May 30, 1899, and that such transcript was filed before it was signed by the judge. The trial judge on September 4, 1899, appears to have signed what purported to be a typewritten transcript of the evidence, previously filed with the clerk on May 30, 1899. There is nothing to show that this document, even if it could be said to answer for a bill of exceptions embracing the evidence, was filed either in open court or with the clerk after it was signed by the judge on September 4th. As previously stated, the clerk in two of his certificates, at least expressly states that the longhand manuscript of the evidence was filed on May 30, 1899, before it had been signed by the judge. If the document in question could be viewed and considered as a bill of exceptions embracing the evidence, as required by the act of 1897, still the date of its filing in court or with the clerk, after it had been signed by the trial judge, should have been expressly shown by the record. That a bill of exceptions containing the evidence is, by the act of 1897, required to be filed after it has received the signature of the judge is settled by many decisions of this court. Ewbank's Manual §32, and cases there cited.

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It follows, and we so adjudge, that the evidence is not before us, therefore, no question is presented upon the ruling of the court directing a verdict thereon.

Judgment affirmed.

157	623
168	120

REAGAN, ASSIGNEE, ET AL. v. FIRST NATIONAL BANK  
OF CHICAGO ET AL.

[No. 19,001. Filed Oct. 8, 1901. Rehearing denied Feb. 4, 1902.]

**CORPORATIONS.—Preferred Stock.—Mortgages.**—Under the provisions of §5064 *et seq.* Burns 1901, that in case of insolvency or dissolution of certain corporations the debts of such corporations shall be paid in preference to preferred stock therein, a mortgage executed by an insolvent corporation securing holders of preferred stock over general creditors is void as to such stockholders. *pp.* 639-647.

**SAME.—Mortgages.—Preferred Stock.—Fraud.**—Where an insolvent corporation, by mortgage, preferred holders of preferred stock over general creditors in violation of statute, the fact that the officers of the corporation honestly believed that it had the right to secure such stockholders will not overcome the presumption that such officers intended the fraud which resulted. *pp.* 644-647.

**SAME.—Insolvency.—Mortgage Securing Holders of Preferred Stock in Violation of Statute.**—An insolvent corporation executed a mortgage to a trustee for the benefit of certain creditors, and included therein the holders of preferred stock in violation of the provision of §5064 *et seq.* Burns 1901, that general creditors shall be paid in preference to such preferred stock. The mortgage contained a provision that all of the mortgagees were to share *pro rata* without priority, except one of the creditors thereby secured, whose claim was to be second and junior to those of the other mortgagees. The mortgagees accepted the mortgage and sought to avail themselves of its benefits as against the trustee for general creditors. *Held*, that one of the beneficiaries cannot assail or repudiate any of the claims of his co-beneficiaries, and that the contract is inseparable and invalid in its entirety as against the trustee for general creditors. *pp.* 647-667.

**NOTICE.—Of Insolvency.—Debtor and Creditor.**—Where a creditor of a corporation has notice of such facts or circumstances which ought to put him upon inquiry as to the insolvency of the corporation, but, instead of doing so, avoids making any inquiry, the law will impute to him notice of such facts as he could have ascertained had he exercised ordinary diligence. *p.* 667.

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**MORTGAGES.—Assignment for Benefit of Creditors.—Insolvency.—**

Where an insolvent corporation on the day it executed a mortgage to a trustee for the benefit of certain creditors, and before any of the beneficiaries therein named had accepted it, or had any knowledge of the fact that it had any existence, made a voluntary assignment for the benefit of creditors, such mortgage cannot be enforced as against the rights of creditors under the assignment. *pp. 667-669.*

**SAME.—Assignment for Benefit of Creditors.—Acceptance of Mortgage.**

—Where mortgaged property, before acceptance on the part of the mortgagees, passed under the supervision and control of the court under an assignment for the benefit of creditors, the mortgagees cannot, by accepting the mortgage thereafter, have their acceptance relate back, and thereby make the mortgage effectual as a lien prior to the recording of the deed of assignment. *pp. 669, 670.*

**SAME.—Corporations.—Insolvency.—Assignment for Benefit of Creditors.—Acceptance of Mortgage by Junior Mortgagee.**—Where an insolvent corporation included the holders of preferred stock in a mortgage to secure certain creditors, in violation of law, creditors secured by a second mortgage, which by its express terms is made subordinate and subject to the first mortgage, will not be presumed to have accepted the same, since such mortgagees would be thereby precluded from assailing the fraudulent claim of the preferred stockholders. *p. 670.*

**SAME.—Acceptance of Mortgage by Trustee.—Corporations.—Insolvency.**—Where an insolvent corporation, in the execution of a mortgage to a trustee for the benefit of certain creditors, made the same subject to such conditions as would overthrow the presumption of acceptance on the part of the mortgagees, the acceptance by the trustee appointed by the mortgagor will not amount to an acceptance on the part of the mortgagees. *p. 671.*

From Marion Superior Court; *Vinson Carter*, Judge.

Action by the First National Bank of Chicago, and others, against John Reagan, assignee of the Krag-Reynolds Company, and others, in which the assignee filed a cross-complaint. From a judgment for plaintiffs for part of relief asked, the assignee and other defendants appeal. *Reversed in part and affirmed in part.*

*W. T. Brown, A. C. Ayres, A. Q. Jones, J. E. Hollett, W. H. H. Miller, J. B. Elam, J. W. Fesler, S. D. Miller, G. E. Hume, W. A. Ketcham, E. E. Gates and H. J. Milligan,* for appellants.

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*N. Morris, L. Newberger, O. B. Jameson, F. A. Joss, J. W. Holtzman, L. A. Coleman, C. W. Smith, J. S. Duncan, H. H. Hornbrook, A. Smith, A. Baker and E. Daniels*, for appellees.

JORDAN, J.—On December 29, 1897, the First National Bank of Chicago, as plaintiff below, instituted this action. Afterwards on December 31, 1897, an amended or supplemental complaint was filed setting out the execution of two chattel mortgages, each executed by the Krag-Reynolds Company, a corporation doing business at the city of Indianapolis. The first of these mortgages was dated December 21, 1897, and was executed to one Lafayette Perkins as trustee, to secure the claims of certain beneficiaries therein named. The second mortgage in question was executed on December 27, 1897, to said Perkins as trustee, to secure the claims of beneficiaries therein mentioned. A part of the relief sought by the amended complaint was (1) to have the court adjudge that Harrie N. Reynolds, Alfred B. Gates, and Nicholas McCarty Harrison, had no right or interest in or to the property or funds embraced in the first mortgage; (2) for the removal of Perkins, as trustee of said mortgage, and the appointment of a receiver in his stead, to carry out the provisions of said instrument. Various reasons for the removal of the trustee were assigned, among which was that the duties to be discharged by him under the stipulations of each of the said mortgages were conflicting. The complainant also prayed for the appointment of a receiver *pendente lite* to take charge of the mortgaged property and dispose thereof under the order of the court. Perkins as the trustee, by virtue of the aforesaid mortgages, and Reagan, appellant herein, as the assignee of the Krag-Reynolds Company, together with plaintiffs' co-beneficiaries and all persons concerned or interested in the proceedings were made defendants and filed their respective pleadings. Each of plaintiffs' co-beneficiaries under the first mortgage

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filed complaints seeking to recover judgments upon their respective claims and a foreclosure of the mortgage, except Nicholas McCarty Harrison, who filed a disclaimer of any interest or right in the property or funds covered by the first mortgage, until after the payment of the creditors of the Krag-Reynolds Company. Reagan, trustee, filed a cross-complaint against the plaintiff and all of his codefendants, including Perkins, as trustee. He alleged in his cross-complaint that each of the said mortgages was void and of no effect so far as he, the trustee, was concerned, because (1) that each of said instruments was executed with the intent to hinder, delay, and defraud the creditors of the insolvent concern; (2) that the first mortgage was obtained by means of a fraudulent agreement to include therein as creditors certain mentioned preferred stockholders of said company; (3) that neither of said mortgages had been accepted by the beneficiaries therein named until after the deed of assignment executed by said Krag-Reynolds Company had been duly recorded in the recorder's office of Marion county, Indiana. Issues were finally joined upon the pleadings filed by the respective parties, and with the consent of Perkins, trustee, a receiver was appointed to serve in his place and stead in the administration of the trust created under the first mortgage. There was a trial by the court, and upon request a special finding was made, upon which the court stated its several conclusions of law in respect to each of the mortgages involved. By its conclusions, the court affirmed in part the validity of the first mortgage of December 21, 1897, and thereby held it to be a valid security in favor of all the beneficiaries therein named, except Nicholas McCarty Harrison and Alfred B. Gates, assignee of Harrie N. Reynolds. In respect to the notes or claims of Gates and Harrison of \$25,000 each, which were executed by said company as hereinafter shown, in consideration of the surrender of preferred stock, and secured by the mortgage in question, the court held the security invalid to the

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extent of these two claims, so far as Reagan, trustee, was concerned or affected thereby. Or, in other words, the conclusions of the court were to the effect that the claims of Harrison and Gates, by reason of the statute applicable thereto, were not entitled to be paid as provided by the mortgage; that the payment thereof must be postponed until all the other creditors of the insolvent company not embraced in the first mortgage had been paid in full. To the extent of this holding, Reagan as trustee, under his cross-complaint, prevailed in his effort to set aside the first mortgage. The court's conclusions as to the second mortgage in issue were to the effect that it was invalid in its entirety as against Reagan, trustee, except as to any surplus arising out of the administration of his said trust and remaining in his hands after the payment of all claims upon final settlement.

Exceptions to the court's conclusions of law were reserved by all the parties aggrieved thereby, and over motions for a new trial the court rendered its judgment and decree, whereby, among other things, it ordered that the proceeds arising out of the property embraced in the first mortgage should be applied in the following order of priority: (1) To the payment of the costs and expenses of the suit and the receivership herein; (2) to the payment of any judgment that may be rendered against the receiver in this action in favor of intervening petitioners, or persons asserting claims by way of replevin suits or petitions; (3) to the payment *pro rata* of the claims of the Capital National Bank, Indiana National Bank, Nicholas McCarty, and Eppens, Smith & Weiman Company, as found in the special finding; (4) to the claim in favor of the plaintiff, First National Bank of Chicago, as found in the special finding; (5) the residue, if any, to be paid to the cross-complainant, John Reagan, trustee, to be administered under the terms of his trust. Motions to modify the special finding, the conclusions of



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law thereon, and also the judgment and decree, were filed by appellants herein, and overruled by the court. Reynolds, the trustee, Alfred B. Gates, and other parties aggrieved by the judgment of the court have appealed and separately assign errors by which they present for review the various conclusions, rulings, and decisions of the trial court.

The special finding is quite lengthy, and in part, at least, we have merely summarized therefrom such facts as we deem essential to the particular question or questions necessary, in our opinion, to be considered in determining this appeal. The following may be said to be the facts which we deem essential to set out in this opinion: On October 25, 1894, the Krag-Reynolds Company was incorporated under the laws of this State for the purpose of doing business at the city of Indianapolis, Indiana; the business to be carried on by this incorporated company was that of the "buying and selling of merchandise and the conducting of mercantile operations, to wit, the preparing of coffees for the market and selling the same; the buying of all kinds of spices, grinding them and fitting them for the market, and selling the same; the buying of buckwheat and manufacturing the same into buckwheat flour for the market and selling the same, and the purchase or manufacture and sale of all kinds of goods which are ordinarily connected with and incidental to the practical operation of the wholesale grocery business." The capital stock of the company was \$100,000, of which \$50,000 was common stock, and \$50,000 was preferred stock; the latter stock by its terms entitled the holder thereof to a semiannual dividend of four per cent. before any dividends should be declared or paid to the holders of the common stock; the right to redeem the preferred stock at any time after the expiration of ten years from the issuing thereof was reserved by the corporation in its articles of association; at the expiration of thirty years such preferred stock was to be payable absolutely. Alfred B. Gates and Nicholas



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McCarty Harrison were the holders of the preferred stock, each holding \$25,000 thereof; William A. Krag, Charles M. Reynolds, and William W. Krag were the promoters and incorporators of the association; Charles M. Reynolds was made president and treasurer, and also the company's financial manager; Nicholas McCarty Harrison was one of the directors. On December 20, 1897, the Krag-Reynolds Company was an insolvent concern, its indebtedness and liabilities being largely in excess of its assets, and far in excess of its ability to pay, and it still continues to be an insolvent concern. On December 21, 1897, the indebtedness of the incorporation, including the two notes held by Harrison and Gates for the preferred stock, amounted to \$365,000, and the actual assets of the corporation did not exceed, as a going concern, \$250,000; Charles M. Reynolds, the president, treasurer, and general manager, as heretofore stated, of the said company, on and prior to December 21, 1897, knew that said company was insolvent. In its insolvent condition the company, through its officers, as it appears, desired to make a mortgage upon its property to secure certain creditors. It was informed, however, by its legal advisers that, in order to execute such a mortgage, the company must first procure the written consent of the holders of a majority of its preferred stock. Thereupon certain negotiations were commenced between Charles M. Reynolds as president, etc., which finally led up to the surrender of the preferred stock held by Gates and Harrison, in consideration of the company executing to each of these preferred stockholders a note for \$25,000, and securing the payment thereof by the mortgage executed December 21, 1897, as hereinafter stated. The facts in regard to the scheme adopted to secure the consent of the preferred stockholders that this mortgage might be executed are more fully and particularly disclosed by the fiftieth paragraph of the court's special finding, which is as follows: "The court further finds that on the 20th day of December, 1897,

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Charles M. Reynolds, the president and treasurer of the Krag-Reynolds Company and its chief manager, advised his attorneys, Hord and Perkins, that the corporation was embarrassed and needed more money; that he thought it could be obtained by increasing the capital stock and inducing the New York creditors to take such stock, in exchange for the notes held by them against the corporation, but in the meantime he wanted to make a mortgage to secure the Indiana National Bank, the Capital National Bank, Nicholas McCarty, the First National Bank of Chicago, and the Eppens, Smith & Weiman Company, whatever might happen; that thereupon he was advised by Hord and Perkins that under the statutes of Indiana the corporation was not authorized to mortgage its property without the written consent of the holders of the majority of the preferred stock, and that it was not likely that they would consent unless in some way they were provided for; that thereupon the plan was advised by Hord and Perkins, and accepted by said Reynolds on behalf of said corporation to redeem or take up such preferred stock, giving to the holders thereof the notes of the corporation for like amounts; that to accomplish this end, and enable the corporation to give said mortgage and avoid the necessity of getting such written consent, negotiations were commenced between said Reynolds and said Gates and Harrison, which finally resulted in redeeming or taking up the preferred stock, giving to the preferred stockholders in place thereof the notes of the corporation, making Gates and Harrison creditors for \$25,000 each, instead of preferred stockholders for like amounts, and securing said notes in the first mortgage of December 21, 1897; \* \* \*. At the commencement of said negotiations with Gates and Harrison it was not the intention of said Krag-Reynolds Company to include the notes of said Gates and Harrison in said mortgage, and the determination to include them was not entered upon until said Gates had declined to accept a note, with-

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out security, for his stock, and then, in order to satisfy Gates, it determined to include the Gates and Harrison notes in said mortgage". After the execution of these notes to the preferred stockholders in lieu of their stock, a meeting of the directory and stockholders of said Krag-Reynolds Company was held on December 20, 1897, at which meeting a resolution was adopted by which it was ordered that the company should execute a chattel mortgage to Lafayette Perkins as trustee, upon the entire stock of goods, wares, and merchandise, etc., held and owned by the company, to secure the indebtedness or claims of certain creditors who were thereafter named as the beneficiaries in the mortgage in question, which bore date of December 21, 1897. It was on the same day further provided by the company, by a resolution adopted, that the mortgage should be in such form and tenor and to contain such provisions and stipulations as the directors of the company in their judgment might deem to be best. Immediately after the adoption of the resolution, the board of directors held another meeting at which the form, conditions, and stipulations of the mortgage to be executed were arranged. Thereafter, on the same day, December 20, 1897, the mortgage of date of December 21st, was executed by the company to Lafayette Perkins, as aforesaid, and by him accepted. This mortgage covered the entire stock of goods, wares, and merchandise of the company, and the claims of the beneficiaries therein named and secured amounted to \$130,000 and over. The following are some of the material parts of the mortgage: The instrument at its beginning states that the Krag-Reynolds Company, a corporation, etc., "in consideration of the sum of \$129,399.93, etc., has bargained and sold and does hereby grant, bargain, sell, assign, transfer, set over, deliver, and confirm unto Lafayette Perkins, of Marion county, in the State of Indiana, as trustee, for each and all of the persons, firms, and corporations following, that is to say, the Indiana National Bank of Indianapolis, the Capital National Bank of

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Indianapolis, Harrie N. Reynolds of Dayton, Ohio, Nicholas McCarty Harrison of Indianapolis, Nicholas McCarty, the Eppens, Smith & Weiman Company of New York, and the First National Bank of Chicago, the following personal property, etc. [Here follows a description of the property and funds mortgaged.] Provided always that these presents are upon the condition that, whereas, said Krag-Reynolds Company is indebted and liable to the aforesaid persons, firms, and corporations as follows:" (Here follows a description of the respective claims, among which is named the note of Harrie N. Reynolds of \$25,000 and the note of Nicholas McCarty Harrison for a like amount, each bearing date of November 1, 1897.) The mortgage further provides as follows: "Now, therefore, if the said mortgagor, the Krag-Reynolds Company, shall well and truly pay said promissory notes as the same severally become due, together with all interest thereon, and shall well and truly perform all of the other conditions herein, then this instrument shall be void, otherwise to remain in full force and effect. This mortgage is upon the express condition that the same is executed unto Lafayette Perkins as trustee for each and all of the holders and owners of the respective claims aforesaid and to secure the payment of each and all of the aforesaid claims equally and *pro rata* and without any priority as between such holders and owners or any of them, and without reference to the maturity of any of such claims, except the indebtedness to the First National Bank of Chicago, which with the note evidencing the same is to be second and junior to all the other indebtedness hereby secured." After providing that the possession of the mortgaged property upon demand of the trustee shall be surrendered to him by the company, and further providing for a sale of the property by the trustee, the mortgage then stipulates and proceeds as follows: "The proceeds arising from such sales, less all expenses thereof, including rents, salaries, insurance, and other charges and

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expenses incurred in the conduct of said business and in the disposition of said property, to be applied to the payment of the indebtedness hereby secured, \* \* \* as hereinabove provided, and if such proceeds shall be more than sufficient for that purpose, the excess, after payment of all costs, charges, expenses, and of all said indebtedness as aforesaid, shall be paid to said mortgagor, the Krag-Reynolds Company." This mortgage was duly acknowledged. At the time of its execution, the notes therein described were executed by the company to the several beneficiaries therein named and heretofore mentioned. The claim of the Eppens, Smith & Weiman Company previous to the time of the execution of the mortgage was held by that company in the form of an open account.

The court further found in respect to the mortgage of December 21st, and the claims therein secured, as follows: "Nicholas McCarty Harrison had already received his note; that all the remainder of said notes save the one to Harrie N. Reynolds were delivered to Mr. Perkins, trustee, to be presented to the respective beneficiaries, and in case of their acceptance under said mortgage to be delivered to them; that Mr. Perkins took the note to Harrie N. Reynolds and delivered it to him, and that thereafter, on the same day, said Harrie N. Reynolds indorsed the same and delivered it, together with his own note for a like amount, to Alfred B. Gates, who thereupon assigned to Harrie N. Reynolds, who delivered and surrendered the same for cancelation to said corporation, the certificate for the preferred stock theretofore held by said Gates. That Nicholas McCarty, both as representing himself and Nicholas McCarty Harrison, was present during the preparation of said mortgage, and at the time of its execution, and at once upon its execution accepted the benefits thereof, both for himself and for Nicholas McCarty Harrison; that at the time of his acceptance thereof he knew that Nicholas McCarty Harrison and Alfred B. Gates had been preferred stockholders in the corporation

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of Krag-Reynolds Company, and the consideration upon which the notes to said Harrie N. Reynolds and said Harrison, respectively, had been executed. \* \* \*

After execution of said mortgage and the delivery thereof to said Lafayette Perkins as trustee, he, on the 22nd day of December, 1897, made known the fact of its execution to the First National Bank of Chicago, Illinois, and inquired if it desired to accept the same, to which it answered that it did, and did accept the same, and received and accepted said new note, and also retained the notes which it already held, said Perkins consenting thereto. \* \* \*

That Mr. Hord, who was a partner in the practice of law with Mr. Perkins, the trustee in said mortgage, at said Perkins' request, carried the note of Eppens, Smith & Weiman Company to the office of said corporation in the city of New York, and there, on December 24, 1897, made known to said corporation the fact of the execution of said note and mortgage, and inquired if it desired to accept the same, and thereupon said corporation did accept the same, and said note was then delivered to said corporation and accepted by it. \* \* \*

That at the time of the acceptance of said mortgage by the First National Bank of Chicago, Illinois, the Indiana National Bank of Indianapolis, Indiana, the Capital National Bank of Indianapolis, Indiana, and the Eppens, Smith & Weiman Company, they did not, nor did any of them, have any notice or knowledge that said two notes for \$25,000, each described in said mortgage as executed to Harrie N. Reynolds and Nicholas McCarty Harrison, or either of them, were executed to procure the surrender and cancelation of said preferred stock, or that they had any connection whatever with the preferred stock of such corporation". Lafayette Perkins, trustee, was a member of the firm of Hord & Perkins, practicing attorneys in the city of Indianapolis, and he and his said partner were the legal advisers of the Krag-Reynolds Company, and so

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continued to be after the execution of the first mortgage. Said trustee at the time of the execution of the mortgage, and at the time he presented the notes secured thereby to each of the said banks for acceptance, knew the consideration of each of the two notes executed for \$25,000, for the preferred stock, and secured by the mortgage as heretofore stated, and he also knew at the same time that the company was indebted to persons other than the beneficiaries named in the first mortgage to an amount at least of \$75,000, and his partner, or associate, Mr. Hord, when the latter presented the notes to the Eppens, Smith & Weiman Company for its acceptance, had like knowledge of these facts. The first mortgage was filed for record in the recorder's office of Marion county, Indiana, on December 27, 1897. Charles M. Reynolds, the president and chief manager of the Krag-Reynolds Company, as heretofore stated, knew that this company was insolvent at and prior to December 21, 1897. On the same day said attorneys, Hord and Perkins, knew that the assets of the company, as a going concern, would not exceed in value \$250,000, and they also knew of liabilities or claims against the company, including the claims of Gates and Harrison for preferred stock, amounting to about \$204,000, and these attorneys also knew that the company was financially embarrassed, and that unless it could at once secure outside help it must inevitably fail. They were also aware that if the mortgage of December 21st was placed upon public records that the credit of the company would be destroyed and its failure would necessarily follow. Charles M. Reynolds, it appears, was surety for some of the claims secured by the first mortgage. On December 21, 1897, Charles M. Reynolds, William W. Krag, and William A. Krag owned all of the stock of said company, except a small amount thereof standing in the name of other persons to qualify them to act as directors. William W. and William A. Krag did substantially any and all things as officers and directors of the company which were requested of them by



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said Charles M. Reynolds and among other things done on the said 21st day of December, said Krag and Krag, in connection with said Reynolds, ratified the act of the latter in withdrawing from the company \$35,000 upon the pretended payment to himself for sums of money claimed to have been advanced by him to the company, when in fact there was nothing due or owing to him from said company. They also at the same time authorized an acceptance by the company of the note of Reynolds for \$20,000 due one year from that date, the amount of this note being for an alleged donation by Reynolds to the company.

The special finding further discloses that on December 20, 1897, Hord and Perkins, with the consent of the company's officers, drew from the treasurer of the company \$5,200 for alleged services rendered and to be rendered by them for the company. On December 21, 1897, at a meeting of the board of directors, the treasurer of the company was directed to pay to Fred Eppert, the bookkeeper, and to Nicholas McCarty Harrison, Charles M. Reynolds, William W. Krag and William A. Krag, extra salaries theretofore voted to them by the directors of the company on March 10, 1896, the amounts allowed being as follows: Charles M. Reynolds \$1,966.66, William A. Krag \$1,966.66, William W. Krag \$983, Nicholas McCarty Harrison \$491.50, Fred Eppert \$983. All of these amounts of money were paid from the funds of the company at that time, although according to the resolution adopted March 10, 1896, they were not to be payable until two years from that date. Perkins, trustee, under the mortgage, on December 22, 1897, went from Indianapolis to Chicago for the sole purpose of notifying the First National Bank of that city of the execution of the mortgage, and to deliver to it the new note secured thereby. On arriving at the city of Chicago, at 9 o'clock at night, he drove to the residence of the bank's president, and gave him the information in respect to the execution of the mortgage, and delivered to him the bank's note, and informed him of



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the execution of the mortgage, all of which he accepted on behalf of the bank. Prior to the execution of the mortgage of December 21st, none of the beneficiaries therein named, except Gates, had requested that it be executed; neither were they pressing the payment of their claims. All the notes secured by said mortgage were in consideration of an antecedent or previous indebtedness of the company, and appear to have been accepted in the main as collaterals. On the face of the note executed to Nicholas McCarty was written the following: "Taken as a collateral security for a note of same amount of date November 22, 1897." On December 27, 1897, the Krag-Reynolds Company also executed to Lafayette Perkins, as trustee, a second mortgage to secure about twenty-nine more of its creditors other than those secured in the first mortgage. This latter mortgage covered claims against the company held by the beneficiaries therein named to the amount of \$226,229 and over; this mortgage virtually embraced the same property covered by the first, but in addition thereto it included certain real estate belonging to the company situate in Marion county, Indiana. This mortgage provided that it was executed to Perkins, as trustee, for each and all of the holders and owners of the promissory notes therein mentioned and described, and that the indebtedness evidenced thereby was to be "subject to the mortgage executed by Krag-Reynolds Company to said Lafayette Perkins as trustee, under date of December 21, 1897." It further provided, among other conditions, that "This mortgage is upon the express condition that the same is executed unto said Lafayette Perkins, as trustee, for each and all holders and owners of the respective claims aforesaid, and to secure the payment of each and all of the aforesaid indebtedness, and first and before and in preference to all others, to secure the payment of said indebtedness evidenced by the aforesaid nine notes to Frank L. Sheldon and Lafayette Perkins, trustees, and second to secure equally and *pro rata* and without any priority as between them or

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any of them, and without reference to the maturity of any thereof, all the other indebtedness secured by this mortgage." It also contained other provisions and conditions in respect to the sale by the trustee of the property mortgaged, and also stipulated as follows: "In case it may be deemed advisable that said Lafayette Perkins, as such mortgagee, continue said business for the benefit of the holders and owners of the indebtedness hereby secured, and buy additional goods for such purpose, and the holders and owners of a majority in amount of such indebtedness and the holders and owners of all the indebtedness secured by the mortgage executed by said Krag-Reynolds Company to said Lafayette Perkins as trustee, under date of December 21, 1897, shall so direct the mortgagee hereunder in writing, said mortgagee shall have the right so to do; and in case it may be deemed advisable that the insurance policies upon the life of W. A. Krag, in which said Krag-Reynolds Company is the beneficiary, aggregating in amount \$145,000, which are also hereby mortgaged, assigned, pledged, transferred, and set over to said Lafayette Perkins, as trustee, hereunder as additional security for the payment of the indebtedness by this instrument secured, be kept up, and the holders and owners of a majority of the indebtedness hereby secured shall so direct said trustee in writing, he shall have the right to do so." This latter mortgage was accepted by Perkins, the trustee, and recorded on the same day of its execution at 11:30 o'clock a. m. in the recorder's office of Marion county, Indiana. The court finds, however, that Perkins had not communicated the fact of this second mortgage to any of the beneficiaries therein named, nor had any of them any notice of its execution, nor had any of them accepted the benefits thereof until after the execution and recording of the general deed of assignment made by said Krag-Reynolds Company as next hereinafter mentioned. On the same day, to wit, December 27, 1897, said company made a general assignment, under the insolvent laws of this State, to one

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Edward L. McKee, for the benefit of all of its creditors, and said deed of assignment was recorded in the recorder's office of Marion county, Indiana, on the same day of its execution at 2 o'clock p. m. McKee, as trustee thereunder, failed to qualify within the time required by law, and thereafter John Reagan, appellant herein, was appointed by the proper court as trustee, and duly qualified as such. After eliminating the claims of Harrison from the first mortgage, and including therein the claim of Gates, the amount of the indebtedness remaining secured thereby, including interest and attorney's fees as found by the court, amounted in the aggregate at the time of the trial to \$110,465.85.

Counsel for appellant Reagan contend that, under the facts as disclosed by the special finding, the first mortgage of date December 21, 1897, must be held invalid so far as the same concerns appellant as the trustee of all the company's creditors, for the following reasons, among others: (1) Because said instrument is bottomed upon and owes its existence to the unlawful and fraudulent scheme adopted to obtain the necessary consent of the preferred stockholders, to wit, by executing the notes of the company to the amount of preferred stock and including them in the mortgage security; (2) because the mortgage in question was procured by Charles M. Reynolds for the benefit of the beneficiaries therein named, and that hence, by accepting its benefits, they adopted as their own the acts, promises, and conditions made by Reynolds in procuring the company to execute the mortgage. It is insisted that he thereby became their agent and his acts and knowledge must be imputed to them; (3) that the mortgage under its conditions, terms, and stipulations is a unit, and all the beneficiaries therein are thereby inseparably joined or united together, and are required to participate in the arrangement to defraud the mortgagors' unsecured creditors.

These propositions in the main are the principal ones presented and discussed by counsel in this case. We have given

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these several questions a careful consideration, and in doing so we have fully considered the arguments of and the authorities cited by the able counsel who appear for the respective parties. To recapitulate: The court's finding reveals the fact that at and prior to the execution of the first mortgage in dispute the Krag-Reynolds Company was grossly insolvent. Its liabilities, at that time, were far in excess of its assets or its ability to pay. Its insolvent condition, at that time, was known to its principal and financial manager, Charles M. Reynolds, and such knowledge, through his agency, must be imputed to the company. In this situation the officers of this company, principally Mr. Reynolds, desired to make a mortgage upon its property to secure the claims of some of its creditors, all of whom, with the exception of two, perhaps, were what may be denominated its "home creditors". The company, it seems, was advised that under the statutes of this State, which provided for and controlled the issuing of its preferred stock, that it could not mortgage its property without the written consent of the holders of the majority of such stock. Alfred B. Gates and Nicholas McCarty Harrison each, it seems, held one-half of this stock, hence it was necessary to obtain the consent of both in order for the company to execute a mortgage valid or effectual in all respects. In this condition of affairs, it appears that its president and financial manager, Mr. Reynolds, consulted with the attorneys and legal advisers of the company in regard to the execution of the mortgage to secure the claims or debts which the company desired to prefer over others. Reynolds, as the facts show, was advised to the effect that the only way open to the consummation of his desire to secure the execution of the mortgage in controversy was either to obtain the written consent of both of the preferred stockholders, or in some manner to get the stock which they held out of the way as an obstacle to the execution of the mortgage. A plan or scheme seems to have been devised by the attorneys of the

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company, Messrs. Hord and Perkins, which was accepted and carried out by Reynolds on behalf of the corporation, which was to the effect that the preferred stock was to be taken up by the insolvent concern executing its notes to the holders thereof to the amount of the stock. In order to obtain the consent as required by the statute, negotiations with the two preferred stockholders in question were begun by Reynolds, which resulted in the taking up of their stock by executing to these stockholders, in the place and stead thereof, two promissory notes of \$25,000 each, bearing date of November 1, 1897, and in securing said notes under the mortgage of December 21, 1897, thereby, in effect, advancing these stockholders to the position of secured creditors. In pursuance of this scheme new notes were also executed to several of the other beneficiaries named in the mortgage, all of which, along with the notes executed to Harrison and Gates, were included in the mortgage. The form of the mortgage and its conditions, terms, and stipulations were all, as it appears, formally arranged by the company at a meeting of its directors and officers held on December 20, 1897, immediately preceding its execution. We have set forth in the statement of facts what such terms, conditions, and stipulations were, so far as we have deemed the same to be material to the solution of the question or questions involved.

The third contention of counsel for appellant Reagan, heretofore mentioned, is more fully and particularly stated in their brief as follows: "Because by the terms of the mortgage or contract itself, the parties, by accepting it, stipulate and agree to dispose of property of the insolvent corporation to defraud the unsecured creditors; that it was the plain purpose and intent of the parties, as shown by the contract itself, to defraud the unsecured creditors, and that every beneficiary therein named becomes by the terms of the contract a party to the fraud by contracting and agreeing that the preferred stockholders shall be treated as creditors and shall

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receive, by virtue of such contract, property of the company, so as to hinder, delay, and defraud creditors."

An act of our legislature, in force since February 28, 1893 (Acts 1893, p. 162), provides for the issuing of shares of preferred stock by any manufacturing or mining incorporated company. The provisions of this act are embraced within §§5064-5069, Burns 1901. Section 4 of this act, being §5067 Burns 1901, provides as follows: "Such preferred stock shall not at any time exceed double the amount of the common stock of such company actually subscribed or issued, and it shall be subject to redemption at par at such time or times, and upon such terms and conditions as shall be expressed in the certificates thereof, and the holders of such preferred stock shall be entitled to receive, and the said company shall be bound to pay thereon such semiannual sum or dividend as may be expressed in the certificates, not exceeding four per centum, before any dividend shall be set aside or paid on the common stock of such company, and in no event shall the holders of such preferred stock be individually or personally liable for the debts, or other liabilities of such company, but in case of insolvency, or upon the dissolution of such company, such debts or other liabilities, shall be paid in preference to such preferred stock. Such preferred stock, however, shall at all times have priority in payment out of the assets of such company over the common stock thereof, for the full face value, together with all arrearages of interest or dividends due thereon."

Section 5, being §5068 Burns 1901, reads as follows: "Such preferred stock shall not be voted at any meeting of such company, nor shall the holders thereof, as such, have any voice in the management of the affairs of such company, excepting, however, that such company shall not have authority to convey its real estate or mortgage any of its property without the written consent of the holders of a majority of the shares of such preferred stock; nor shall such company without such consent declare any dividend upon its common

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stock that will impair its capital. Such preferred stock shall not entitle the holders thereof to any interest in the assets of such company beyond the par or face value of such preferred stock, together with all arrearages of interest or dividends due thereon."

It will be readily seen by the express provisions of §5067, *supra*, that the holders of such preferred stock are in no event to be personally liable for the debts or liabilities of the company. In case, however, of the company's insolvency, or upon its dissolution, the statute commands that the debts or other liabilities of such company shall be paid in preference to such stock. Or, in other words, when such company has either become insolvent or has been dissolved, the effect of this provision of the law is to give the creditors of the company an absolute and unqualified preference in the payment of their claim over the payment of the preferred stock. By the above §5068, *supra*, it is provided that such company "shall not have authority to convey its real estate or mortgage any of its property without the written consent of the holders of a majority of the shares of such preferred stock". When the company was confronted with the provisions of the statute above mentioned, which denied its authority to execute a binding and effectual mortgage as against its two preferred stockholders, without their consent, it seems that some log-rolling, or maneuvering, was resorted to in order to obtain the surrender of the preferred stock and thereby remove it as an obstacle in the way of making the mortgage for the purpose desired. The scheme originated, as the facts disclose, was to substitute the company's notes for the total amount of the preferred stock certificates. Gates, the holder of one of these certificates, appears to have held the key to the situation which confronted the promoters of the scheme to get the preferred stock out of the way of the contemplated mortgage. He being in a position to dictate terms, it appears, declined to accept the note of the company for his share of stock, un-



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less the same was secured. It appears, then, that in order to satisfy him and obtain his consent to the execution of the mortgage in question, the insolvent company decided to embrace therein as a preferred claim, not only the stock note which was to be executed to Gates, but also the note given to Harrison for the surrender of his stock. This decision of the company was consummated and carried into effect under the mortgage in controversy, and thereby an attempt was made to confer upon these two stockholders rights and preferences by this insolvent corporation over its unsecured creditors, which the law denied; not only were they by the provisions of this instrument advanced and preferred over the unsecured creditors, but also over the claim of the First National Bank of Chicago, one of the co-beneficiaries. The statute in question denied the right of the Krag-Reynolds Company in its insolvent condition to advance its two preferred stockholders in the manner which it did to the position of secured creditors, thus preferring their claims over those of its unsecured creditors without the consent of the latter; hence the act of the company, under the circumstances, in so doing, was a transgression of the law. By this action of the insolvent company, these stockholders were awarded an undue preference or an advantage over its *bona fide* unsecured creditors. This preference was an evasion of the statute in question, and operated as a fraud upon the rights of such creditors.

It is argued by counsel for appellees that the officials of the company honestly believed that it had the right to secure, under the mortgage, the claims of Gates and Harrison, and therefore ought not to be considered guilty of or intending to perpetrate a fraud upon the rights of its unsecured creditors. We are not impressed with this contention. It is certainly true that "Where there is no law, there is no transgression"; but it is equally true that where the law exists and the transgression or violation thereof is admitted, the intent of the transgressor follows as a legal inference or con-



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clusion. It is true that in this State fraud is a question of fact, and not one of law, but where the act of a person necessarily operates to defraud creditors, or results as a fraud in and upon their rights, the actor will be presumed to have intended the fraud which resulted. *Personette v. Cronkhite*, 140 Ind. 586; *Anderson v. Etter*, 102 Ind. 115; *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755; *Hilliard v. Cagle*, 46 Miss. 309; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160; *Roberts v. Vietor*, 130 N. Y. 585, 29 N. E., 1025.

The rule is elementary that every person is presumed to intend the natural or probable consequences of his own acts, and when a fraud is shown the court will attribute to it its legal consequences, or, in other words, where the conduct of a debtor necessarily results in defrauding his creditors, he is presumed to have foreseen and intended such results. *Anderson v. Etter*, 102 Ind. 115; Wait on Fraud. Conv. (3rd ed.) p. 19.

In *Coleman v. Burr*, *supra*, an action was brought to set aside certain deeds upon the grounds that they were made with the intent to hinder, delay, and defraud the creditors of the grantor. In the course of the opinion in that case, Earl, Judge, speaking for the court, said: "The statute (2 R. S. 137 §4) provides that the question of fraudulent intent in cases of this character 'shall be deemed a question of fact and not of law'; and the claim is made that here there is no finding by the referee of a fraudulent intent; but that on the contrary he has found the whole transaction to be fair and honest. He has, however, found facts from which the inference of fraud is inevitable, and although he has characterized the transactions as honest and fair, that does not make them innocent nor change their essential character in the eye of the law. Mr. Burr must be deemed to have intended the natural and inevitable consequences of his acts, and that was to hinder, delay and defraud his creditors. Bump on Fraud. Conv. (3rd ed.), 22, 24, 272, 278; *Cun-*

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*ningham v. Freeborn*, 11 Wend. 241; *Edgell v. Hart*, 9 N. Y. 213, 59 Am. Dec. 359; *Ford v. Williams*, 24 N. Y. 359; *Babcock v. Eckler*, 24 N. Y. 623-632.”

When tested by the statute in question, the legitimate creditors of this corporation, when it became insolvent, were given an absolute preference in the payment of their claims over the preferred stockholders, but by the terms, conditions, and stipulations of the mortgage, these stock claims, it seems, as a matter of contract, were by the company preferred, in defiance of the law, over the claims of all of its unsecured creditors, and also over the claim of one of the beneficiaries named in the mortgage. By the express terms of the instrument, the notes of Gates and Harrison, in respect to their payment, were placed on an equality with certain beneficiaries therein named, and were to share *pro rata* in payment out of the proceeds of the mortgaged property, along with the claims of the other beneficiaries therein, except that of the First National Bank of Chicago. By the terms of the mortgage the claims of the latter were made secondary to the notes of Gates and Harrison. It appears that the company, by including the claim of Gates in the mortgage, was thereby enabled to satisfy him and to induce him to yield his consent to its execution. The mortgage, at least so far as it concerns Gates and Harrison, must be regarded as fraudulent in the sense that it secures claims which the mortgagor was prohibited by law from embracing therein. It operated to defraud the unsecured creditors of the company, and consequently was obnoxious to the statute of frauds. §6645 Burns 1901, §4920 Horner 1897. As a question of law then, upon the facts and circumstances disclosed, the act of the company in securing the payment of the notes of Gates and Harrison, as provided by the mortgage, to the prejudice of the rights under the law of its unsecured creditors, can not be upheld, but must be condemned as violative of law. The effect of the company's act in transferring its property to Perkins, as trustee, by the mortgage in controversy, was to

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withdraw it from the reach of its unsecured creditors, and thereby, under its provisions, to invest Gates and Harrison with rights in and to such property and the proceeds thereof which, as we have seen, under the circumstances, the law denied. We conclude, for the reasons stated, that the mortgage of December 21st, so far at least as Gates and Harrison are concerned therein, is invalid as against appellant Reagan, the trustee who stands in this action as the representative of the creditors of the insolvent concern.

We next turn to a consideration of the insistence of counsel for appellant, that this mortgage must be regarded as a unit, and that therefore, under and by force of its conditions and stipulations, the beneficiaries therein by contract are coupled or united together. Or in other words, that all by the contract into which they have entered under the mortgage have agreed that the claims of Gates and Harrison, their co-beneficiaries, shall be paid as therein directed, and are consequently united with said beneficiaries in upholding the fraudulent claims of the latter; that under the contract they will not be allowed to dispute or contest these claims. It is therefore insisted that if the instrument is invalid in part as held by the trial court, it must be deemed to be invalid as an entirety. The contention more specifically is that all of the beneficiaries, by their contract, under the terms and stipulations of the mortgage, have fixed their relations and obligations to each other; that by its terms they have so coupled or joined themselves together that they can not be permitted to sever or assail the claims of Gates and Harrison upon the grounds of fraud or otherwise. It is asserted that the Indiana National Bank has no more right, under the terms of this mortgage, to object to the payment of these claims, as directed in the mortgage, than have the beneficiaries under the second mortgage of December 27th, which was made subject to the first mortgage of December 21st, to attack the claims secured by the latter on the ground of fraud. The mortgage in question upon its face professes

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and declares that it is executed upon certain express conditions as follows: "This mortgage is upon the express condition that the same is executed unto Lafayette Perkins, as trustee, for each and all of the holders of the respective claims, and to secure the payment of each and all of the aforesaid claims, equally and *pro rata* and without any priority as between such holders and owners without reference to the maturity of any such claims, except the indebtedness to the said First National Bank of Chicago, which with the note evidencing the same is to be second and junior to all of the other indebtedness secured hereby." The mortgage, as it appears, further directed that the proceeds arising from the sale of the mortgaged property should be applied to the payment of the indebtedness thereby secured, as therein provided.

The mortgagor, the Krag-Reynolds Company, was the owner of the property transferred or mortgaged to Perkins, as trustee, and it certainly was under no legal obligation to execute this mortgage to secure its antecedent indebtedness. The execution of the instrument on the part of the company, under the circumstances, was simply a matter of favor, hence, as a matter of its own choice, it could impose or provide therein such conditions or directions for the disposal of the mortgaged property and the application of the proceeds thereof as it desired. This, so far as the beneficiaries therein were concerned, it certainly had the right to do. That it had the right to tender this mortgage to the several beneficiaries or mortgagees in question, with all of its express terms and stipulations for their acceptance, must certainly be conceded, but the beneficiaries were under no legal obligations to accept it. They could either accept or decline. Perkins, as trustee, therein named, accepted the trust as provided, and each of the beneficiaries as shown accepted the mortgage, and in this action they are claiming under it and are seeking to avail themselves, as against appellant Reagan, of all of its benefits. This mortgage is the

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source from which Perkins, as trustee, and the beneficiaries therein, claim and derive all of their rights and powers, and the directions given or stipulated in the instrument must be followed so far as these parties are concerned until set aside according to law. *In re Lewis*, 81 N. Y. 421; *Roberts v. Vietor*, 130 N. Y. 585, 29 N. E. 1025; Perry on Trusts §597, §602g. In the latter section the author says: "The powers of trustees under deeds of trust, and of mortgagees under mortgages with power of sale, depend entirely upon the terms of the deeds. Such powers are created by, and exist in the deeds, and of course they exist in the terms in which they are created, and in no others. They are to be exercised by the trustees *in pais*. They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another and not because the law or the courts have conferred or authorized them." It follows, therefore, that the courts can not direct Perkins, as the trustee, to pay a debt of the mortgagor or give it preference in violation of the terms and conditions of the mortgage, and the rights of the beneficiaries thereunder. As was said by the court *In re Lewis, supra*: "To hold the contrary would be to put the court in the place of the assignor and assert a right to modify the terms of the assignment, after it had taken effect, against the will of its maker, and to the injury of those protected by it." See, also, *Chapin v. Thompson*, 89 N. Y. 270; Bishop on Ins. Debtors, §359; *Jessup v. Hulse*, 21 N. Y. 168; Wait on Fraud. Conv. (3rd ed.), §316.

Where a debtor voluntarily assigns or transfers his property for the security of his creditors, if the latter choose to accept the benefits of such assignment, they must abide by the provisions and conditions imposed. They must accept its provisions as an entirety. They will not be permitted to accept it in part and repudiate it in part. Burrill on Assignments (3rd ed.), §479, and (6th ed.), §429; *Alliance, etc.*,

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*Co. v. Eaton*, 86 Tex. 401, 25 S. W. 614, 24 L. R. A. 36; *In re Lewis*, 81 N. Y. 421; *Roberts v. Vietor*, 130 N. Y. 585.

What we have here said, in regard to the effect of an acceptance upon the part of creditors of an assignment or mortgage made by a debtor for their benefit or security, has no reference to an assignment made in pursuance of our insolvent laws, where all of the debtor's property, by virtue of such statutory assignments, passes under the control or administration of the court.

The beneficiaries, as we have previously said, all accepted this mortgage as security. None, except Harrison, has disclaimed or renounced his interests or rights therein. But all, with the full knowledge of the grounds of attack made and presented by the cross-complaint of Reagan, trustee, in respect to the invalidity of the instrument, are seeking to avail themselves of its benefits. That by its acceptance they have become bound as matter of contract by its terms and stipulations, and therefore are not in a position to assail the claims of Gates or Harrison upon the ground of fraud or otherwise, is fully settled by the decisions of this court.

In the appeal of the *Muncie Nat. Bank v. Brown*, 112 Ind. 474, 482, the mortgage in that case, executed in favor of the bank and by it accepted, expressly stipulated that it was to be "second and subsequent" to a prior mortgage executed by the mortgagor to Brown and Jenners to secure certain described indebtedness. The bank, in the lower court, was denied the right to assail the mortgage of Brown and Jenners as fraudulent. On appeal to this court this ruling was affirmed. In the opinion, by Elliott, J., the court said: "The Muncie National Bank is not in a situation to complain of this ruling, for in the mortgage which it accepted that executed to the appellee is recognized as valid. It is recited in the former mortgage that 'it is expressly stipulated herein that this mortgage is made second and subsequent to that of one executed to Cornelia A. Brown and John C.

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Jenners to secure the payment of certain of the indebtedness of the said Francis M. Brown to them and each of them as described in said mortgage.' Having treated the mortgage as a valid one, the bank can not be allowed to assail it on the ground that it was made with the intent to defraud creditors." *Barr v. Hatch*, 3 Ohio 527; *Irwin v. Longsworth*, 20 Ohio 581; *Bump on Fraud. Conv.*, 465.

In the case of *Anderson v. Oskamp*, 10 Ind. App. 166, that court held that where a person accepts a chattel mortgage wherein it is stipulated that it is "second and subsequent" to a prior mortgage covering the same property, he will not be allowed to assail such prior mortgage on the ground that it is fraudulent. In the course of the opinion in that case, the court said: "We are unable to see any great inequity in the enforcement of the rule which holds appellees bound by the provisions of the instrument under which they assert their rights. They are not claiming here their right as creditors merely to subject the property fraudulently conveyed to the payment of their debt by the ordinary process of the law, but they assert a contract right, claiming under the mortgage, and superior to the position of creditors standing on their rights as creditors. By this contract right they sought and obtained a preference over all the other unsecured creditors. If they are not permitted to dispute the validity of the first mortgage, they are deprived of nothing which they expect to obtain. Their mortgage only purports to give them a lien second to appellant's mortgage. They received exactly what they contracted for. Their debtor offered them certain security. They accepted it, thus obtaining a preference over the other creditors."

In the case of *Old Nat. Bank v. Heckman*, 148 Ind. 490, the bank had accepted a mortgage executed to it by the Indiana Pottery Company. This latter mortgage provided and stipulated that it was subject to the provisions of a prior mortgage executed to one Rosine Heckman and others to secure certain indebtedness. The question arose in that



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case as to the effect of these provisions in respect to the prior mortgage and in what regard and in what manner the second or junior mortgagee was bound thereby. This court held that the junior mortgagee, under the circumstances, could not attack the prior mortgage as fraudulent unless he abandoned his rights under his mortgage. In the course of the opinion by McCabe, Judge, this court said: "It is no injustice and no hardship to limit such a person to the express terms of the contract upon which he sues. It is no answer to this position for him to say as the appellant bank did in the case now before us, that had he known that the first mortgage was fraudulent and void as against creditors, he would not have accepted the second mortgage with the stipulation that it was to be subject to such first mortgage. The refusal so to accept would not have bettered the condition of the person so refusing. The mortgagor was not bound to execute any mortgage whatever. It takes two contracting parties to make that contract, the same as any other. If the mortgagor could not obtain the terms to be inserted in the contract of mortgage which he demanded, he had a right to decline to enter into it, the same as the mortgagee had a right to decline to receive it if its terms did not suit him. But it may be said that as appellant bank was ignorant of the fraud in the first mortgage when it accepted the second with the stipulation mentioned therein, it ought to be allowed in foreclosing its own mortgage to show such fraud to the overthrow of the first mortgage, because it is axiomatic that fraud vitiates and paralyzes everything it permeates. That would be true in any proper proceeding to avoid or set aside any contract or mortgage for fraud. But the appellant bank was not seeking to set aside its own mortgage for fraud or anything else. It was seeking, so long as the first paragraph of its cross-complaint remained undismissed, to enforce its mortgage by foreclosing it. But that is not all it was seeking to do; it was seeking to enlarge the terms and conditions of its own mortgage contract by proving fraud



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against the first mortgage. Fraud may furnish means to avoid one contract, but not to enlarge the terms of another, which would amount to the court making a new contract for the parties which they never made for themselves. \* \* \* Thus it will be seen that the cases involving the question now under consideration do not rest upon the doctrine of estoppel in a strict legal or technical sense, though some of the authorities referred to say that the second mortgagee is estopped to deny the validity of the first mortgage. But it is apparent that they all rest upon the principle that a party seeking to enforce a contract in his favor must be bound and limited in his relief thereunder to the terms and stipulations of the contract."

These decisions of our own courts fully affirm and sustain the contention that the stipulations and conditions in the mortgage in dispute are contractual and that each and all the parties who accepted it and are claiming benefits and rights thereunder are bound by and must abide by its terms; that they can not enforce it or enlarge their rights thereunder by procuring some of the claims secured thereby to be eliminated therefrom for the reason that they are fraudulent, without violating the express terms and conditions therein imposed by the mortgagor and assented to by the mortgagees, which stipulations and terms provide that the claims therein secured should be paid out of the mortgage fund in the order as directed by the mortgage. If the stipulations, conditions, and terms of this mortgage are binding upon and can not be disputed by the beneficiaries, for the reason that they are a part of the contract, it would seem that the reasonable effect of this contract between the mortgagor and the beneficiaries, as well as among each other, under its terms, would be that the claims of Gates and Harrison should be preferred and paid, as provided, out of the proceeds of the mortgaged property of the insolvent company, to the prejudice of the rights of its unsecured creditors.

In some of our sister states, a voluntary assignment for

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the benefit of creditors, containing preferences, is upheld. Such assignments, in their effect and operation, to an extent at least, are similar to the trust mortgage herein involved. In enforcing these instruments of assignments, the same rule asserted by this court in the decisions cited in regard to mortgages is recognized, and it is held that the parties must be controlled thereby, and that the instrument of assignment must be enforced, if at all, according to its terms and conditions, and that the court can not be put in the place of the assignor and assert a right to modify the terms and provisions of the assignment against the will of the assignor, and to the injury of those protected by its provisions. See Wait on Fraud. Conv. (3rd ed.), §316.

*Jessup v. Hulse*, 21 N. Y. 168, was an action to set aside a conveyance of real estate arising out of an alleged fraudulent assignment by one Hulse to Gott in trust for the benefit of creditors. The court in considering the effect of the provisions of the assignment said: "The assignor, being the absolute owner of the property, and in no manner obliged to assign, may annex such conditions and qualifications to the transfer as he pleases. If he annex an improper condition, the court must pronounce the assignment itself void. It can not hold the transfer good, and disregard the condition; because that would be to take the property from the assignor against his will. He having consented to part with his title only upon certain conditions, the transfer and the conditions must stand or fall together. If, therefore, the court upholds the assignment, it must of necessity protect and enforce the terms and conditions upon which it is made. It can not substitute its own discretion for that with which the assignor has in express terms invested the assignee."

In the appeal of *Brigham v. Tillinghast*, 13 N. Y. 215, in speaking of trusts created by such assignments, the court said: "By our laws trusts may be created to sell property for the payment of debts. But these trusts, when created and declared, must be capable of being executed in the man-

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ner specified in the instrument creating them without contravening any statute or settled principle of the common law.”

The general force or trend of the authorities is that under a common law assignment in trust for the benefit of creditors, it is the duty of the assignee to uphold his trust, not to impeach it, and he can not object to the payment of the claim of a creditor preferred in the deed of assignment upon the ground that such preferred claim is fraudulent. *Roberts v. Vietor*, 130 N. Y. 585, and cases there cited. •

In Bishop on Ins. Debtors (3rd ed.), §419, the author states the rule as follows: “If the assignee is directed to pay certain persons upon certain specified amounts, either with priorities or proportionately, the assignee who accepts the trust, and all the creditors who come in and share under it, are bound by the provisions of the deed and can not dispute them. This proposition, which rests on the doctrine of election, that he who accepts a benefit under an instrument can not dispute the validity of its provisions, is abundantly sustained by the authorities. \* \* \* If the claims so provided for are fictitious or fraudulent or such as for any reason ought not to be paid, that will be a ground for setting the assignment aside as fraudulent and void, but it will not furnish a ground upon which a creditor claiming under the assignment as a valid instrument can dispute the claim of another creditor provided for in the same manner in the same instrument.”

The decisions of this court also fully recognize and affirm the rule asserted by the preceding authorities in regard to assignments at common law. In *Seibert v. Milligan*, 110 Ind. 106, the question in respect to the validity of the statutory assignment therein involved and its effect in carrying into the trust property of the assignor which he had omitted, or had previously fraudulently conveyed, was considered. In the opinion in that case, Mitchell, J., said: “The distinction between an assignment under the act regulating

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voluntary assignments, and an assignment at common law, is to be steadily kept in view. At common law a debtor might assign the whole or any part of his property, for the benefit of all or a part of his creditors. In such an assignment the relations of the parties were created and controlled entirely by contract. The assignee had no power except such as the contract conferred upon him. He stood in the place of the assignor, in respect to all property fraudulently conveyed, and could assert no claim to such property, which the latter could not himself have asserted. Only such property as was described in the deed passed to the assignee in such a case, and property fraudulently conveyed was not affected by such an assignment."

The authorities seem fully to sustain the proposition that if a common law assignment is fraudulent in part, the whole instrument is thereby vitiated and rendered void. *Caldwell v. Williams*, 1 Ind. 405; *Roberts v. Vietor*, 130 N. Y. 585; *Mackie v. Cairns*, 5 Cow. 547, 15 Am. Dec. 477; *Grover v. Wakeman*, 11 Wend. 187-225, 25 Am. Dec. 624; *Simons v. Goldbach*, 56 Hun 204, 9 N. Y. Supp. 359; *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755.

In *Caldwell v. Williams*, 1 Ind. 405, the question arose in respect to a fraudulent common law assignment for the benefit of creditors. The contention in that case was that although the assignment was fraudulent as to the assignor and assignees still if the creditors, the *cestui que trust* for whose benefit the assignment was made, were not parties to the fraud, the assignment should stand for the benefit of such innocent creditors. This contention the court denied, and in the course of its opinion said: "The contract of assignment is between the assignor and assignees. The creditors generally are parties to it, if at all, by subsequent assent, expressed or implied. That assent was given to the contract, such as it was, between the assignor and assignees, with full opportunity, in this case, on the part of creditors to observe the character of the assignees, and the ap-

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parent suspicious nature of the transaction; and if that contract was fraudulent, the assent of the creditors under such circumstances has not purged it of the fraud even as to them. But aside from this, in the present case, the assignees are also among the largest creditors provided for in the assignment. This being the case, the assignment is fraudulent as to two, at least, of the creditors, as well as to the assignees, as we have already held; and, being general of all the property for the payment of all the named debts, and not of separate parts of the property for the payment of specified debts, the fraud pervades the whole assignment, and must, at least as to the personal property, vitiate the whole; for how can we separate the good from the evil? \* \* \* Again, it is a general doctrine that a deed void in part for fraud is void *in toto*."

In *Russell v. Winne*, 37 N. Y. 591, it was contended that if the chattel mortgage involved in that case was fraudulent as to part of the property therein embraced, that the instrument was thereby rendered fraudulent as to the entire property mortgaged. This contention was sustained by the court of appeals and in the course of the opinion it is said: "The mortgage was one single instrument, given to secure one debt. To render it valid, it must have been given in good faith, and for the honest purpose of securing the debt, and without any intent to hinder or defraud creditors. This can not be true when the object, in part, or as to part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument. The unlawful design of the parties can not be confined to one particular parcel of the property. Entire honesty and good faith is necessary to render it valid; and whenever it indisputably appears that one object was to defraud creditors, to any extent, the entire instrument is, in judgment of law, void. It is not at all analogous to a class of cases where it has been held that a part of an instrument, of itself valid, and not dependent

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upon other parts which are invalid, may be enforced. Here the fraudulent design, if it existed, destroys the foundation of the entire instrument."

It is perhaps needless to cite further authorities to sustain the doctrine so universally asserted, that any mortgage or conveyance which is fraudulent as to part of the property transferred, or which, if made to depend upon a consideration partly fraudulent, is thereby rendered void as an entirety against the creditors of the grantor, unless such contract is in its character or nature so framed that the illegal part may be separated and eliminated from that which is legal. *Consumers Oil Co. v. Nunnemaker*, 142 Ind. 560-568, 51 Am. St. 193, and cases there cited. The following additional authorities in respect to this proposition may be consulted: 6 Am. & Eng. Ency. of Law (2nd ed.), 757; 9 Am. & Eng. Ency. of Law (1st ed.), 881, 882, 883; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Jaffray v. Wolf*, 4 Okla. 303, 47 Pac. 496; *Everhardt v. Puckett*, 73 Ind. 409; *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151; *Adams v. Niemann*, 46 Mich. 135, 8 N. W. 719; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621.

It is insisted by counsel for appellee that the fraudulent parts of the mortgage in question may, under the rule stated, be separated from the parts which are legal, and that therefore the instrument can be sustained, so far as it secures the honest claims therein included. It is true that where a mortgage or deed is executed to secure the claims of several creditors, that an honest creditor does not necessarily lose his security because the instrument providing the security embraces fraudulent claims, provided the latter claims are distinct and separable from the honest and valid claims therein secured. This doctrine is generally asserted and approved by the authorities and is recognized by the decisions of this court. See *Morgan v. Worden*, 145 Ind. 600. But, as said by the court in the case last cited, "If the claims and actions of the mortgagees were not distinct and divisi-

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ble quite another question would confront us." Neither can it be disputed, as contended by counsel for appellee, that a creditor has the right to accept security for a debt justly due him. It is equally true that an insolvent corporation has the right to prefer one or more of its *bona fide* creditors over its other creditors. If the mortgage in this case simply professed to secure the just claims of the other beneficiaries along with those of the two preferred stockholders, without fixing the priority of such latter claims, or directing the order in which they should be paid, thereby making the mortgage to depend upon these express terms and conditions, quite a different question would be presented. But as previously asserted, no beneficiary or mortgagee of the mortgage in controversy, by reason of the force of his contractual relation to his co-beneficiaries, under its express terms and conditions, will be permitted to assail or repudiate, on the ground of fraud or otherwise, any of the claims of his co-beneficiaries. It is certainly true that one of the features of a mortgage, severable or separable in its parts, is that any one of the mortgagees therein may be allowed to contest the validity of any other claim therein secured, without violating any of the terms or conditions by which he is bound under the mortgage. Such a mortgagee or beneficiary would have the same rights and occupy the same position in this respect as though his claim was secured by a separate mortgage executed to himself alone, including no other claim than his own, and which made no reference or imposed no terms or conditions in respect to some other mortgage embracing the same property. If separate mortgages had been executed by this insolvent company to each one of the beneficiaries in question, and if each of these separate mortgages had provided and stipulated in like manner as the mortgage in controversy, to the effect that the claims of Gates and Harrison should stand on an equal footing and share *pro rata* with the claims of the other beneficiaries, except the claims of the First National Bank of Chicago, which were made second-



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ary, then, under such circumstances, those who held just or valid claims would certainly not occupy any better or different positions than they now do under the mortgage in dispute. The legal effect, under such circumstances, of the terms and conditions imposed in each separate mortgage, would be the same as it is under the terms and stipulations of the instrument involved. It is true that Harrison, before the trial, surrendered or quitclaimed his interest in and to the mortgage in question, still, so far as the questions involved in this case are concerned, his claim may be regarded and treated as though such action had not been taken on his part. By the decision of the trial court, the mortgage, in so far as it secured the claims of the preferred stockholders, was so modified or changed as to eliminate these claims from the security. It is evident that thereby the beneficiaries, other than the Chicago bank, were relieved of the burden of the mortgage which they had assumed, to the effect that the claims of Gates and Harrison should stand on an equal footing with their own. The Chicago bank was relieved of the burden or condition to the effect that these claims should be preferred in payment over its own. It is certainly manifest that in the event the proceeds of the mortgaged property should, for any cause, prove insufficient to pay in full all of the claims included by the mortgagor, the action of the court in eliminating these claims from the mortgage security, to the amount of \$50,000 and over, would greatly inure to the benefit of the other beneficiaries. The holding of the court, under such circumstances, would enlarge their rights from what they were under the mortgage which they accepted. This would be the result although contrary to the express terms and conditions of the instrument. The Krag-Reynolds Company, as the mortgagor, it appears, consented to convey its property to Perkins, as trustee, upon certain express terms and conditions. These terms and conditions were intended by the company when it executed the instrument, and by the beneficiaries when they accepted its benefits, to



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operate and be enforced as a whole, and not in part. Consequently the mortgage, as constituted, under its express provisions and conditions, can not be modified or annulled in part, and upheld in part, without contravening the intention of the parties. The beneficiaries by accepting the benefits of the mortgage and asserting their rights thereto certainly must be considered as having concurred in its intent or purpose, which, as we have said, was to secure and pay all of the claims therein embraced in the manner and order stipulated. By accepting the provisions of the instrument, all of its terms and conditions constituted a binding written contract between the parties, precisely the same as if it had been signed by each of them. *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, 21 Am. St. 189; *Indianapolis Nat. Gas Co. v. Kibbey*, 135 Ind. 357.

The facts disclose that when the execution of the mortgage was first contemplated, it was not the intention of the company to include therein the claims of Gates and Harrison. Gates, as heretofore stated, it seems, held the key to the situation and was in a position to dictate terms. He declined to accept a note for his stock unless it was secured. No effectual or binding mortgage, by reason of the terms of the statute, could be made in favor of the home creditors, or any others, without obtaining the consent of Gates. His consent to the mortgage appears to have been purchased by the company on the condition or upon the consideration that his claim should be embraced in the security, and paid in the order as therein provided. The directors and stockholders of the insolvent company held a meeting and agreed to the frame of the instrument as it was finally executed and accepted. The mortgage in question, under its conditions, when viewed in the light and circumstances leading up to its execution, must be considered as impressed with the illegal agreement between the company and Gates by which his consent was obtained. The company at the time of its agreement with him, and at the time it executed the mort-

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gage, and at the time it was accepted by the beneficiaries was, as shown, grossly insolvent. It was certainly bound to take notice of its insolvent condition, and, as previously said, the knowledge of Reynolds, its president and financial manager, in regard to such conditions, must be imputed to the corporation. In that condition it was chargeable with notice that a positive statute, by which it was governed, fixed the rights of its creditors, and made their rights superior to those of its preferred stockholders in respect to the payment of their claim. By reason of the force and effect of this law, any agreement or contract of the company, when insolvent, by mortgage or otherwise, without the consent of its creditors, which in its provisions would be at variance with or antagonistic to their preferred rights under the statute, would be in defiance of law, and therefore could not be sustained. If the court in this case carries out or enforces the mortgage contract in question according to its intent and purpose as expressed by its terms and conditions, its action or decision in so doing will be contrary to law and will permit the mortgage to operate as a fraud upon the unsecured creditors. Again, if the mortgage contract is upheld in part, and annulled in part, the action of the court will be contrary to the intent of the instrument, as fixed by its contractual terms and conditions, to which all of the beneficiaries have assented and agreed to be bound, and such action of the court will virtually result in enforcing a contract entirely different from the one into which the parties entered. When confronted with this state of affairs, what, under the law, is the duty of the court? It can not, as the authorities affirm, put itself in the place of the mortgagor and assert a right to modify the terms of the instrument against the will of its maker and against the will of those benefited and protected thereby. The only consistent thing that a court can do, under such circumstances, where the illegal contract is inseverable, is to declare it to be invalid as a whole, and leave the parties in the condi-

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tion they were before its execution. While it is true that the claims of the beneficiaries, other than Gates and Harrison, may be considered as valid and might have been preferred by the company although insolvent, nevertheless, the instrument, as we have seen, in which they are included, was executed upon the express conditions and stipulations that the claims of Gates and Harrison should be paid as provided or directed. The payment of these latter claims out of the proceeds of the mortgaged property, under the peculiar scope, terms, and conditions of the mortgage, is so connected with the payment of the valid claims as to be inseparably united. Or in other words, the legal and illegal parts of this contract, under its terms and conditions, are so mingled, interwoven, and united with each other, that they can not be separated, so that the illegal part may be avoided, and the legal portion sustained. As the contract is tainted and vitiated in part, and being inseparable, for the reasons stated, a court can not rescue the part which is good from that which is evil, and enforce the former without defeating the intent and terms of the contract. Under such circumstances the rule or maxim of the law which asserts "void in part, void *in toto*" applies, and the contract must be held invalid in its entirety. The decision of *Henderson v. Pierce*, 108 Ind. 462, where the court eliminated the preferences made in the deed of assignment, but otherwise sustained it, as a general statutory assignment, is distinguishable from the case at bar, and has no application to the question as here involved. The insolvent debtor in that case honestly intended, it seems, to make a general assignment in pursuance of our insolvent laws for the benefit of all of his creditors, and intended that such assignment should be operative in accordance with the statute pertaining thereto. The court in that case so treated the assignment and gave effect to the intent of the assignor. The valid claims held by the beneficiaries, other than Gates and Harrison, were debts of the company contracted pre-

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viously to the execution of the instrument. These beneficiaries by accepting the mortgage security surrendered nothing, for it, at least so far as they were concerned, was executed upon a past consideration. The new notes executed by the company to these beneficiaries and secured by the mortgage were, as it seems, accepted by them merely as collaterals; hence, if they are deprived of their security, they will certainly be in as good a condition as they were before they accepted it. They voluntarily placed themselves in the position which they now occupy, by accepting a mortgage which by its terms and stipulations inseparably united and connected their claims with the fraudulent claims of Gates and Harrison. They can not be permitted to deal at arm's length with this insolvent company, and then, when confronted with the attitude in which they have placed themselves, seek to be relieved on the ground that they did not know what the character or scope of the contract was into which they entered. They were bound to know at their peril when they accepted the mortgage what its terms and conditions were, and they can not now be exempted from the results thereof because they may have had no actual knowledge of the import and effect of such terms and provisions. But it is insisted that they had no knowledge of the insolvency of the company at the time they accepted the mortgage, but believed it to be solvent; that they did not know that Gates and Harrison were preferred stockholders, and that their stock claims were included in the security, hence it is claimed they can not be considered as agreeing to or participating in the fraud upon the unsecured creditors that may result from the operation of the mortgage. There are no conditions or limitations in the statute in question, whereby its mandate forbidding the preference of the company's stockholders over its creditors when insolvent, which require the operation of that law to depend upon the notice of such insolvency. The company, as previously stated, was bound to take knowledge of its insolvent

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*status*, and to know that when in that condition the law stripped it of the right to prefer these stock claims in payment over the claims of its creditors. The terms and provisions of the mortgage at the time it was executed were open to the inspection of the beneficiaries had they desired to learn their import and effect. If they accepted the favor which the company by its mortgage extended to them, without knowing the character or nature of its terms and stipulations in which they were concurring, or without knowing the position in which they were placing themselves by accepting the mortgage as framed, in the event any of the claims of their co-beneficiaries were fraudulent, such ignorance, under the circumstances, can not be invoked as an excuse, for they must be presumed to have known what an examination of the mortgage which they accepted would have disclosed. Had they examined the instrument before accepting it, and thereby concurring in its terms, they, no doubt, would have discovered that under and by its terms, if they accepted it, they must assent to the direction of the mortgagor that the claims of Gates and Harrison should stand on a parity with their own. The Chicago bank, had it made an examination, would also have discovered that it must, by accepting the mortgage security, consent that the claims of Gates and Harrison should be preferred over its own. Such an examination would have further disclosed undoubtedly to these beneficiaries that the intent or purpose of the instrument, under its terms, was, that it should be enforced, in respect to the payment of the claims therein secured, as an entirety, and that by accepting it they must concur in its intent as revealed by its provisions. Having concurred in the intent of the mortgage by agreeing to its terms as therein fixed, it must follow that if the enforcement of the instrument as a whole will operate as a fraud, or will invade the legal rights of the company's unsecured creditors, the beneficiaries or mortgagees must be deemed to have intended such necessary results, for, under such circumstances, it is the le-

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gal and not the moral intent which the law regards as controlling. It was certainly the duty of these beneficiaries, under the circumstances, to investigate as to whether or not any of the claims which they were consenting should stand inseparably on an equality with their own in their payment were illegal or fraudulent. If they discovered any of that character they could have rejected the mortgage as framed and have stood on their rights as unsecured creditors. Having inseparably connected or united themselves with evil or fraud, they must, in a legal sense, be deemed to be participators therein and must suffer the consequences of their act.

If it could be said that under the circumstances in this case knowledge of the insolvency of the company was essential, the following state of facts disclosed by the court's finding would certainly have force in determining that question. It appears that the mortgagees or beneficiaries other than Gates and Harrison were not, at or previous to the time the mortgage was executed, pressing their claims for payment, or demanding security for the same. Mr. Perkins, the trustee, on the day following the execution of this instrument, went on a special mission to Chicago, for the sole purpose of delivering the new note executed by the company to the Chicago bank, which was included in the mortgage, and to advise the latter of the execution of the security. On arriving at that city in the night-time, he secured a carriage and immediately drove to the residence of the bank's president, and there in an interview with him delivered this note and gave him the information in respect to the mortgage being executed. Mr. Hord, the law partner of Mr. Perkins, and one of the company's attorneys, about the same time, at the instance of Perkins, went to New York City for the sole purpose of delivering to the Eppens, Smith & Weiman Company its note, and to inform it that the mortgage had been executed, all of which duty he seems to have performed. Nicholas McCarty, another one of the beneficiaries, is shown to have been present at the time the mortgage was prepared

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and executed, and he at once accepted the benefits thereof, both for himself and his nephew, Nicholas McCarty Harrison. It is further disclosed that Nicholas McCarty at the time he accepted the mortgage knew the consideration of the notes secured therein to Gates and Harrison. The beneficiaries mentioned, as well as their co-beneficiaries, who were notified of the execution of the mortgage, must, in reason, have known that the company, by allowing the mortgage to be placed on the public records, would necessarily thereby impair its credit as a going concern. In view of the foregoing facts it would certainly seem that they had reasonable grounds to suspect or believe that the company in executing this instrument, under the circumstances, was as a going solvent corporation acting at least outside of the ordinary course of business. These facts ought to have been sufficient to put an ordinarily prudent person upon inquiry, and a reasonable inquiry or investigation on the part of these beneficiaries would certainly have revealed the fact that the company was insolvent. Where a person has notice of such facts or circumstances which ought to put him upon inquiry, but, instead of doing so, studiously avoids making any inquiry, the law will impute to him notice of such facts as he could have ascertained had he exercised ordinary diligence. Wade on Notice, §11.

Without further considering the question in respect to the invalidity of this mortgage, we conclude that as against appellant Reagan it ought to be held entirely void. Hence, the court, under the facts, erred in not so adjudging.

The decision of the trial court in respect to the invalidity of the second mortgage of December 27, 1897, is also called in question. The facts relative to this mortgage disclose that on the same day that it was signed by the company and delivered to the trustee and in a very short time thereafter before any of the beneficiaries therein named had accepted it or even had any knowledge of the fact that it had any existence, the company made and caused to be recorded, as



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provided by law, a general statutory assignment of all of its property, including that embraced in the mortgage in question, to an assignee or trustee, for the benefit of all of its creditors. It is contended by the parties adverse to this mortgage that under these circumstances, as against the general assignment deed, no title or interest in or to the mortgaged property passed to the beneficiaries as against the intervening rights of creditors, arising out of the assignment, because the mortgage was not accepted by the beneficiaries before the assignment deed was filed for record. That a deed or mortgage, in order to be effectual against the rights of third parties, must not only be delivered, but must also be accepted by the grantee or mortgagee before the rights of such third party intervene, is firmly settled by the decisions of this court. *Goodsell v. Stinson*, 7 Blackf. 437; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Evans v. White*, 53 Ind. 1; *Tharp v. Jarrell*, 66 Ind. 52; *Eaton v. McKahan*, 91 Ind. 109; *Jones v. Loveless*, 99 Ind. 317; *Owen v. Williams*, 114 Ind. 179; *McFadden v. Ross*, 14 Ind. App. 312.

In *Dale v. Rodman*, 3 Metcalf 139, the plaintiff claimed under a mortgage deed which was made by her debtor without her knowledge and which she had neither accepted nor ratified before the mortgaged property had been duly assigned to the defendant under the insolvent laws of Massachusetts. The court held in that appeal that any acceptance or ratification on the part of the mortgagee after the statutory assignment in question could not avail to intercept the title of the assignee to the property assigned to him. The same rule is asserted in *Jones on Chat. Mort.* (4th ed.), §§104, 113. In the first section, the author states the rule as follows: "A mortgage executed by a debtor to his creditor without the knowledge of the latter, and without authority from him, and delivered to a stranger or to the mortgagor's attorney for his use, does not vest the title to the property in the mortgagee as of the time of such delivery, as between him



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and a creditor of the mortgagor who has acquired an interest in it by attachment or levy of execution between the time of such delivery and the mortgagee's acceptance of the mortgage after receiving notice of it." To the same effect see, *Welch v. Sackett*, 12 Wis. 270; *Miller v. Blinebury*, 21 Wis. 684; *National State Bank, etc., v. Morse*, 73 Iowa 174, 34 N. W. 803, 5 Am. St. 670.

In this latter case it is asserted that "No person can be said to agree to that of which he is ignorant." As the assignment in question was made and recorded before the mortgage was accepted by any of the beneficiaries, it will, for the reasons stated, prevail over the mortgage, for it is settled under our insolvent laws that on filing the assignment deed all of the debtors' property will *eo instanti* pass to the assignee and be brought under the jurisdiction and control of the court. §2900 Burns 1901; *New v. Reissner*, 56 Ind. 118; *Forkner v. Shafer*, 56 Ind. 120; *Seibert v. Milligan*, 110 Ind. 106; *Voorhees v. Carpenter*, 127 Ind. 300.

As the mortgaged property had passed under the supervision and control of the court, the beneficiaries could not, by accepting the mortgage thereafter, have their acceptance relate back and thereby make the mortgage effectual as a lien prior to the recording of the assignment deed. The relation between the insolvent debtor and his assignee after a statutory assignment has taken effect does not rest on contract alone. Their relations to each other and the respective relations of the assignee and the assignor's creditors are fixed by law. But it is contended that the mortgage in question was for the benefit of the mortgagees therein named, hence the law will presume or imply their assent thereto until the contrary appears. But the rule asserted by the authorities in such cases is that in order to justify a presumption of acceptance of a deed or mortgage it must clearly appear to be for the benefit of the beneficiaries therein and not burdened with conditions which will deprive them of

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some material right. *Alliance, etc., Co. v. Eaton*, 86 Tex. 401, 25 S. W. 614, 24 L. R. A. 36. .

This second mortgage executed by the company to Perkins as trustee, by its express terms is made subordinate and subject to the first mortgage of December 21st. An acceptance thereof by virtue of this condition would, as previously shown, have precluded the acceptors from assailing the fraudulent claims of Gates and Harrison. Again, by accepting it they would be required to assent to the payment of all of the claims secured by the first mortgage, which in the aggregate amount to \$130,000 and over, before anything could be paid out of the proceeds of the mortgaged property upon their own claims. They would also by their acceptance be required to assent to the proposition provided by the terms of the second mortgage which is to the effect that in the event the holders of all the indebtedness secured by the first mortgage and a majority in amount of the second should so direct, that Perkins, as trustee, might continue to carry on the business of the company and purchase additional goods. They were also required by this mortgage to accept notes which were not payable until thirty days after date, and which, if accepted, would deprive them of taking any immediate action as creditors, which they otherwise would be entitled to do but for the acceptance of such thirty-day notes for their claims. Under such circumstances and conditions, the law will not imply or presume their assent to such a mortgage. See Perry on Trusts (2nd ed.), §206e, and the many authorities collected under foot-note 5, in 24 L. R. A., p. 376.

As a rule, mortgages like the one under consideration rest on contract between the mortgagor and the mortgagees, and so long as the latter may refuse or decline to accept the security on the terms and conditions offered, the mortgagor is not bound. It is true that there are some decisions of sister states which apparently hold that the assent of a mortgagee is not necessary in such cases, but these decisions run

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counter to the great trend of the authorities. Neither can the proposition be sustained that because Perkins accepted the trust created by the mortgage, that such acceptance on his part must be considered as inuring to the benefit of the mortgagees, and must be viewed as an acceptance in their behalf until they repudiate the same. It certainly must be true as a legal proposition that a debtor who has executed a mortgage for the benefit of some of his creditors can not appoint an agent to act for them in accepting such mortgage. Perkins was selected by the company as its trustee or agent to carry into effect the provisions of this mortgage, but in no sense can he be regarded as the agent of the beneficiaries before their acceptance of the terms and provisions of the mortgage. They must be considered as having the privilege, when such a mortgage deed as the one in controversy is tendered to them, either to accept or reject it, and until they accept it there can be no effectual contract existing between the mortgagor and them. Had the beneficiaries notified Perkins, the trustee, of their acceptance before the assignment in controversy was recorded, their rights to the mortgaged property, so far as the question of acceptance, as here involved, is concerned, would have been superior to those of Reagan under the assignment. *McLaughlin v. Carter*, 13 Tex. Civ. App. 694, 37 S. W. 666. But as it expressly appears that they did not accept the mortgage before the filing of the assignment deed for record, the mortgage, therefore, can not be enforced as against the rights of creditors under the assignment, and the decision of the trial court adjudging the instrument invalid as against Reagan, the assignee, was right, and should be affirmed.

It is contended on behalf of Alfred B. Gates that the latter was, under the provisions of the statute controlling his preferred stock, in fact, a creditor of the company, and a preferred stockholder in name only. Be this question as it may, the statute, as we have seen, expressly declares that when the corporation has become insolvent, that the debts

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and liabilities held against it shall be paid in preference to such preferred stock. Consequently, if the stock be viewed in the nature of an indebtedness it will not relieve such creditor, under the circumstances in this case, of the force and effect of the statute. If the Gates' note in question had been in good faith accepted for the surrender of his stock before the company had become insolvent, perhaps a different question might be presented, but when the company had once become insolvent, its rights or authority to merge this stock into a note and then prefer it as it did over the payment of the claims of its *bona fide* creditors, is, according to the letter and spirit of the statute, forbidden. Even though it may be regarded in the nature of an indebtedness, and not stock as denominated by the statute, still, under the circumstances, the preference accorded to it by the mortgage could not be sustained. When such company becomes insolvent it is immaterial whether such stock then continues to be evidenced by a stock certificate or is merged into a promissory note, it, under the provisions of this positive statute, must be postponed in its payment until all the other debts are paid. The law does not regard the shadow of the thing, but rather the substance, hence, the fact that a note may have been executed for the surrender of this stock, does not enlarge the right, under the law, of the stockholders.

We are constrained to conclude that both of the mortgages in dispute should be held void and ineffectual so far as appellant Reagan is concerned; therefore, the court erred in sustaining and enforcing in part the mortgage of December 21, 1897. The judgment of the court so far as it adjudges the mortgage of December 27, 1897, to be invalid, is affirmed, otherwise it is reversed, and the cause is remanded to the lower court, with instructions to restate its conclusions of law on the special finding and hold that the mortgage of December 21, 1897, is wholly void, so far as the same affects the rights of Reagan, the trustee, and render judgment accordingly.

## ON PETITION FOR REHEARING.

JORDAN, C. J.—Certain ones of the losing parties in this appeal petition for a rehearing. The first of these petitions is presented by the Southern California Packing Company and others therewith associated. The second petition is presented by the Indiana National Bank, Capital National Bank, First National Bank of Chicago, Nicholas McCarty, and Eppens, Smith & Wieman Company. The petitioners in the first mentioned petition in support of their petition refer us to the argument and authorities in the original brief, and the sole ground upon which they rest their petition for rehearing is, that this court in its opinion failed expressly to consider and pass upon the grounds presented by them at the former hearing in respect to the invalidity of the claims of the New York banks. These petitioners filed no motion in the trial court for a new trial, and hence the ruling of that court of which they complain is its conclusion of law affirming the validity of the claims mentioned upon the special findings. Paragraph eight of the court's finding discloses that the notes in question were all executed and issued by the Krag-Reynolds Company, through its proper officials, for money advanced by the several banks, which money was deposited to the credit of said company in the Importers and Traders National Bank of New York; that the company was notified of such deposit and thereupon drew out a portion thereof and used the same in its business. Part of this deposit, as it appears, was checked out by Charles M. Reynolds, the principal manager of the company, and by him misappropriated. It is disclosed, however, that the banks in controversy advanced the money in good faith, in the due course of business, on the notes executed by the company, without any knowledge or reason to believe that Reynolds had any intention of using any part of the money for other than the legitimate purposes of the corporation. Certainly upon these facts the trial court could

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declare no other conclusion than it did in its seventh conclusion of law, whereby it held and declared that the notes in question were valid and legal claims against the Krag-Reynolds Company. This conclusion under the facts found was fully authorized, and the judgment of the trial court thereon is affirmed.

The petition for a rehearing of the Indiana National Bank and others is apparently based on the fact advanced and asserted therein that we should at the former hearing have accepted the contention of these parties, that they as a part of the beneficiaries of the mortgage in dispute have a standing thereunder which is independent and separate from that of Gates and Harrison, who are virtually conceded to be fraudulent claimants. In other words, the contention of the parties is renewed to the effect that, although the Krag-Reynolds Company, an insolvent concern, in the fulfilment of the promise made by it to Gates and Harrison in order to obtain their consent to the execution of the mortgage, agreed, under the terms of this instrument, to turn over to these preferred stockholders \$50,000 of its assets, which the law required should be applied on the claims of its other creditors, and further provided and stipulated that the petitioners herein and the stock claimants, their co-beneficiaries, should share *pro rata* and equally with each other in the distribution of the proceeds of the mortgaged property, to all of which stipulations these petitioners agreed and consented, still, notwithstanding these facts, they should be permitted, over the protest of Gates as well as that of Reagan, the trustee, to repudiate the mortgage so far as it secures the fraudulent claims of Harrison and Gates, but be awarded its benefits so far as they themselves are concerned. This contention was fully considered and denied at the former hearing, and what is asserted in support of the petition for a rehearing does not convince us that, in so holding, we committed an error. It is said that the sole purpose of the officials of the corporation in executing the trust mortgage was to secure its *bona fide* debts. That may have been its original

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purpose, but when it was confronted with the fact that it could not exercise this right without the consent of its two preferred stockholders, it then, to an extent at least, seems to have departed from this purpose, and by executing the mortgage it is shown to have designed and intended to secure, in violation of law, the stock claims of Gates and Harrison, as a reward for the consent of the latter that the instrument might be executed. Counsel seemingly overlook the fact that the very thing which made it possible for the corporation to execute the mortgage at all was the illegal agreement between it, Gates and Harrison, to the effect that their stock claims should be secured by the mortgage as a reward for their consent to its execution. That was the consideration for their consent, and the evil thereof under the stipulations and terms of the mortgage permeated the instrument as an entirety. The company at the time, as shown, was insolvent, and by reason of that situation was forbidden by a positive statute to carry this agreement into effect. Its officers, under the circumstances, were confronted with the proposition that in order to carry out the preferences which they desired to give to some of the creditors they must first secure the consent of Gates and Harrison, or otherwise the claims of those which they desired to prefer must go unsecured. To obtain the requisite consent they were, under the agreement, required to include at least the claim of Gates in the proposed mortgage, and thereby violate the statute, and perpetrate a fraud on their other creditors. They seem to have adopted the latter, and in carrying out this fraudulent purpose, or scheme, the mortgage was so formulated as to stipulate and direct that the fraudulent claims of Gates and Harrison should stand on a parity and be paid along with those of the other beneficiaries, except the Chicago bank. To all the stipulations, provisions, and directions as embodied in the mortgage each and all of the petitioners herein agreed and consented, when they accepted the instrument as tendered, and thereby permitted their claims in respect to the payment



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thereof to be inseparably linked and united with those of Gates and Harrison. And now when confronted with the effect of their agreement they contend that it should be abrogated, or in other words, that the court in granting the demand or prayer of appellant for the annulment of the mortgage shall eliminate the fraudulent claims therefrom and leave the instrument as to their own claims untouched. That so far as the mortgage fixes the rights of Gates and Harrison in respect to the payment of their claims along with those of the petitioners, the latter virtually concede that it should be annulled, but so far as it concerns and benefits themselves they insist it must be upheld and enforced. While repudiating or disowning the contract in which they concurred whereby the rights of these stock claimants were fixed in conjunction with those of their own, they in the same breath insist that their interests or rights as declared and fixed by the mortgage must be maintained. The mortgage when tendered disclosed by its terms that it proposed, if accepted, to create contractual relations, not only between the acceptors and the mortgagor, but also among the latter in regard to the rights of each in sharing in the application of the proceeds of the mortgaged property to their respective claims. An examination of the mortgage as tendered certainly revealed its peculiar character or nature and the rights of the parties as therein fixed under its expressed terms and stipulations. If they accepted it at long range, or with eyes closed, they, when confronted with its fraudulent features to which they assented, can not relieve themselves of the situation in which they are placed under their agreement by successfully demanding that the mortgage, so far as it concerns their interests, shall be sustained, but avoided so far as the claim of Gates and Harrison is concerned. Certainly it must be evident that under the circumstances they are not in a position to avail themselves of the benefits thereof and at the same time dispute the rights of Gates and Harrison, by whose consent they were enabled to obtain the benefits of the security for which they now con-



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tend. Having accepted the instrument and concurred in what may be termed its evil or fraudulent provisions, they can not seek to avail themselves of their rights as fixed in connection with those of the fraudulent claimants, and at the same time repudiate or deny the rights of the latter which stand on a parity with their own. Therefore, being unable, under the facts, to defend against the demand of appellant in this action that the mortgage in question shall be avoided, and being further unable to show that under the circumstances they are entitled to have the fraudulent claims separated from their own and eliminated from the security, the court must yield to the prayer of appellant that the instrument by reason of the fraud imputed to it be annulled in its entirety. We may again repeat that the petitioners herein accepted the mortgage merely as a security for preëxisting debts without any new or additional consideration, hence the avoidance thereof will place them in no more unfortunate situation in respect to the payment of their claims than they occupied at the time they accepted the security. The insistence of counsel that if the decision in this appeal is permitted to stand it will become a mischievous precedent and one that will be injurious to commercial business, is entirely without merit. The decision is to be construed in respect to the circumstances and facts upon which it rests. No questions in regard to innocent holders of commercial paper, on of like import, are involved.

We have fully examined all of the authorities cited by the learned counsel for the petitioners and have fully considered their arguments, but discover no authorities which can be said to be at variance with the proposition, that where a party, as in this case, has by contract precluded himself from attacking a conceded fraud which is impressed upon an instrument under which he claims, he must accept the consequences of such fraud.

We are of the opinion that the ultimate conclusion reached at the former hearing is right, and therefore each of the petitions for a rehearing is overruled.

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ADAM, MELDRUM & ANDERSON COMPANY v.  
STEWART ET AL.

[No. 19,277. Filed Nov. 26, 1901. Rehearing denied Feb. 25, 1902.]

**CHATTEL MORTGAGE.**—*To Secure Preëxisting Debt.*—*Fraud.*—A mortgage made to secure an antecedent debt will not be sustained against a vendor who has been induced to part with the mortgaged property by the fraud of the mortgagor. *p. 680.*

**SAME.**—*To Secure Preëxisting Debt.*—*When Valid.*—A mortgage executed by a fraudulent purchaser of goods, to secure antecedent creditors, will be held valid as to such creditors who, in consideration of the mortgage, and without notice of fraud, have extended the time of their debt, or assumed any new or additional obligation. *p. 681.*

**REPLEVIN.**—*Goods, the Sale of which Induced by Fraud.*—The seller of merchandise cannot maintain an action in replevin against the buyer thereof, on the ground that the sale was induced by fraud, without first restoring or offering to restore the amount received on account of such sale. *p. 682.*

From Wabash Circuit Court; *H. B. Shively*, Judge.

Action in replevin by Adam, Meldrum & Anderson Co. against Thomas Stewart and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

*J. B. Kenner* and *U. S. Lesh*, for appellant.

*W. P. Breen* and *John Morris, Jr.*, for appellees.

**HADLEY, J.**—Appellant, a corporation, as a vendor, brought replevin to recover of the mortgagee of its vendee certain merchandise alleged to have been fraudulently purchased. The venue was changed to the Wabash Circuit Court. Judgment for the appellees. No question arises upon the pleadings. The only error assigned is the overruling of appellant's motion for a new trial, which challenges the sufficiency of the evidence to support the finding and certain rulings of the court on proffered testimony.

The material undisputed facts follow: Appellee Stewart on the 26th day of November, 1897, was engaged as a retail dry goods merchant in Huntington, Indiana; for several

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years he had bought most of his goods of appellant, engaged in the wholesale dry goods business in Buffalo, N. Y. February 18, 1895, when he was establishing his business at Huntington, he borrowed \$5,000 of his wife, Isa A. Stewart, for which he executed to her, on that date, his note bearing six per cent. interest from date until paid. Soon after the beginning of his business at Huntington, Stewart opened an account with appellant for goods, which at the close of 1896 he had suffered to run against him for about \$4,000. At this time he had never submitted, nor been requested to submit, to appellant a statement of his assets and liabilities, but upon the receipt from appellant of a semiannual statement of his account, Stewart voluntarily, in explanation of his default in payments, on January 7, 1897, made in writing a statement showing \$10,500 capital over liabilities, which, at best, was erroneous by the amount he owed his wife and \$2,000 to the First National Bank of Huntington. Appellant's credit man testified that, believing and relying upon the truth of the statement, he extended indulgence, and thereafter, beginning on February 13, 1897, and ending October 27, 1897, in the usual course of trade the house sold Stewart, by a traveling salesman, forty-three additional bills, ranging from \$6.83 to \$602, and aggregating \$6,115. In the same period Stewart made appellant divers payments on account amounting to \$3,397, and returned goods, not ordered, on several occasions, amounting to \$189, and as testified by Stewart, and which seems not to have been denied, on November 15, 1897, paid appellant on the goods sued for \$257. On June 5, 1897, Stewart again wrote appellant, "our liabilities outside of yourselves are less than ever, and are simply nominal." In the autumn of 1897 appellant urged Stewart to secure his indebtedness, and on November 26, 1897, he executed three notes, one to his wife for \$5,831, being a renewal of her former note, with interest accrued to date; one to Breen for \$500, being for past and then contracted indebtedness, and one to Eisen-

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hauer for \$85 for rent then due, each of said three notes made payable in bank at one day after date, and at the same time executed to appellee Schuckman, as trustee, a chattel mortgage on his entire stock in trade, to secure said three notes and one payable to the First National Bank of Huntington, of previous date, for \$1,500. Schuckman took immediate possession under the mortgage. On the following day, November 27th, appellant brought this suit against Schuckman, trustee, and Stewart to recover all goods sold to Stewart after the erroneous statement of January 7, 1897.

These facts, it is argued, show (1) that Stewart got possession of the goods delivered to him by the appellant between the dates of January 7th and November 26, 1897, by such active fraud as empowered appellant to rescind the contracts of sale, and retake the goods, and (2) that they do not show that the beneficiaries of the chattel mortgage to Schuckman, trustee, are innocent purchasers for value within the meaning of the law. The first of these propositions becomes immaterial if the second should be determined against appellant's contention. No claim is made that either of the debts secured by the mortgagor is invalid, or that either of the mortgage beneficiaries had any notice or knowledge of the false representations made by Stewart to appellant.

It may be stated as a general rule that a mortgage made to secure an antecedent debt will not be sustained against a vendor who has been induced to part with the mortgaged property by the fraud of the mortgagor. In such cases equity will restore to the defrauded vendor that which is rightfully his, when in the doing it only takes from the mortgagee the advantage of his security, which has cost him nothing, and leaves to him unimpaired all his rights under the original contract. *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247; *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. 497; *Cobbey on Replevin*, §286, and cases cited. *Tiffany on Sales*, p. 122, and cases cited. *Burdick on Sales*, p. 169.

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But a mortgage executed by a fraudulent purchaser upon goods that have come into his possession in the usual course of trade, and over which he has continued to exercise dominion, and give forth the appearances of ownership, by mixing and exposing them to sale with his other goods, will be held valid as to a mortgagee, who, in consideration of the mortgage, and without notice of the fraud, has extended the time of payment of his debt or assumed any new or additional obligation. *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *United States, etc., Co. v. Harris*, 142 Ind. 226, 238; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Mears v. Waples*, 3 Houst. (Del.) 581; *Shufeldt v. Pease*, 16 Wis. 689; *Chicago Dock Co. v. Foster*, 48 Ill. 507; Cobbey on Replevin, §415; Tiedman on Sales, §327.

The facts of the case are that, in consideration of the mortgage, Mrs. Stewart accepted a renewal of her note, and extended the time of payment of her debt; Eisenhauer accepted a note and extended the time of payment of his past due account; Breen accepted a note for \$500, payable in bank one day after date, \$250 of which was for a past due account, and \$250 for legal services then contracted for, to be then and thereafter rendered. These persons having no notice of Stewart's fraud in the purchase of the goods, if there was any, and having all surrendered the right to sue their debtor for a definite period, and Breen having assumed a new obligation, must be classed as innocent purchasers for value within the rule above stated. The fact that the mortgage to the First National Bank of Huntington rested solely upon a preëxisting debt cannot affect the decision of the case. Schuckman's possession of the property as the trustee of Mrs. Stewart, Eisenhauer, and Breen is rightful, and replevin will not lie against one legally in possession in favor of one who has no superior right.

The judgment of the circuit court is right for another reason. It is a familiar rule that a contract induced by fraud is not void, but voidable only at the option of the party

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defrauded. It rests solely with the defrauded party to say whether or not the contract shall stand, and until repudiated by him it is valid. He may abide the contract and seek redress in damages; or, if he acts within a reasonable time after discovery of the fraud, he may rescind the contract, and reclaim his property. But if he elects to rescind there must be a complete restoration of everything of value the party defrauded has received under the contract. He will not be permitted to undo the contract while retaining money, or other valuable thing, delivered him under its terms. *Thompson v. Peck*, 115 Ind. 512, 1 L. R. A. 201; *Haase v. Mitchell*, 58 Ind. 213; *Balue v. Taylor*, 136 Ind. 368; *Tiffany on Sales*, p. 119; *Tiedman on Sales*, §163.

It is shown by the record that Stewart testified that on November 15, 1897, eleven days before the execution of the mortgage to Schuckman, trustee, and nine months after the first purchase of goods subsequent to the January 7, 1897, statement of assets and liabilities complained of, he paid appellant on the goods sued for \$257. It does not appear that the testimony was denied by appellant, and must be accepted as true. The sum thus paid was not returned, or tendered to appellees before the commencement of this suit, which of itself is fatal to appellant's right of recovery.

The propositions arising upon the admission and rejection of testimony relate exclusively to the question of Stewart's fraud, which we have found unnecessary to consider.

Judgment affirmed.

CANNON v. CLEVELAND, CINCINNATI, CHICAGO AND ST.  
LOUIS RAILWAY COMPANY.

[No. 19,499. Filed Nov. 26, 1901. Rehearing denied Feb. 27, 1902.]

RAILROADS.—*Use of Right of Way by Foot-Passengers*.—A user of a part of a railroad right of way by the public, as a highway for foot-passengers, where such use was neither exclusive nor adverse, would not prove an implied dedication or a prescriptive right, no matter how long continued. p. 685.

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**RAILROADS.**—*Injury to Person on Track.*—A person injured while using a foot-path maintained by a railroad company along its right of way, but not dedicated to the public, cannot maintain an action for an injury caused by the company's failure to have a watchman, or its failure to operate gates or to give warning of approaching trains, since the company owes such person no duty except to refrain from wilfully injuring him. pp. 685-689.

From Floyd Circuit Court; *W. C. Utz*, Judge.

Action by Mamie G. Cannon against the Cleveland, etc., R. Co. From a judgment for defendant, plaintiff appeals. *Affirmed.*

*E. B. Stotsenburg, J. H. Weathers, G. W. Galvin and W. A. Reading*, for appellant.

*J. T. Dye, L. J. Hackney and M. Z. Stannard*, for appellee.

**BAKER, J.**—A demurrer for want of facts was sustained to appellant's complaint, in which she demanded judgment for \$10,000 for personal injuries. She refused to plead further and judgment for appellee was entered. The ruling on the demurrer is assigned as error.

The material parts of the complaint are these: "That on March 21, 1896, the defendant was, and for more than six months previous thereto had been, engaged in operating a railroad in and through Delaware county, Indiana, with railroad tracks upon and over which locomotives and cars were run and propelled by steam; that the railroad passed through the city of Muncie, in Delaware county, and was constructed and operated in and through a thickly settled part of said city, where numerous foot-passengers were compelled to walk on, along, over and across said railroad tracks; that for the convenience of said railroad company and to enable it better to carry on its business, it had constructed its said railroad, on, over and across certain lots in said city of Muncie, owned by said defendant, and had constructed an open roadway five feet in width extending from Mulberry street to Walnut street; that, although the said



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strip of land so opened and used by said defendant was the private property of said company, yet with knowledge and consent of defendant, the same was, and for more than six months previous to the happening of the grievances hereinafter mentioned had been, continually used by the public, in common with said defendant, as a highway for foot-passengers, and at all hours of the day, the said way was so used; that on March 21, 1896, the plaintiff was carefully and rightfully passing on, over and across said roadway to the place where she was employed; that before entering upon said strip of ground she looked and listened in both directions but did not and could not hear or see any locomotive or car upon said strip or approaching the same; that after said plaintiff entered upon said strip and continually while she was traveling thereon, until the time of the grievances hereinafter mentioned, she looked and listened in both directions for the approach of a train, but by reason of the curve in the track of said railroad she could not hear or see any locomotive upon said strip or approaching the same; that while said plaintiff was then and there proceeding along said way in a careful manner, the defendant so negligently operated its road that she was wrongfully and negligently run against and permanently injured; that no bell was rung, no whistle was blown, nor was any warning of any kind given of the approach of said locomotive, nor was any watchman, gate, fence or barrier of any kind on, upon or across said strip of ground to notify persons using the same of the approach of a locomotive or train of cars; and that said locomotive approached said plaintiff from behind and going in the same direction she was, so quietly and so quickly that she had no knowledge of its approach until she was struck by it and knocked down; and plaintiff says that said accident and injury were caused solely by the wrongful negligence of the defendant and without any fault on the part of the plaintiff."

It appears that the alleged "highway for foot-passengers"



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was upon appellee's premises and extended longitudinally along and upon the tracks from one street to another. It was constructed by appellee for its own purposes and convenience. The public, in common with appellee's servants, used it as a footway. Appellee's servants presumably used it in the performance of their duties. The public used it for their own convenience as a short cut between streets. The way was used by the public with appellee's knowledge. The "consent", averred in the complaint, taking the intendments most strongly against the pleader, must be held to be only that consent which is implied from the public's use without appellee's express objection after knowledge of the use,—because no broader "consent" is directly alleged. Appellant did not go upon the premises to transact any business with appellee. She went purely for her own convenience, without invitation or inducement from appellee. There is no averment that the engineer saw appellant and thereafter negligently ran the engine upon her. The right to recover is predicated upon appellee's failure to have watchmen and barricades and to blow whistles and ring bells to keep appellant out of danger, without knowing that she was on the premises.

The basis of the action is negligence. It was therefore incumbent upon appellant to show that appellee owed her the duty to exercise the particular care the omission of which is alleged to have been the direct cause of the injury. Do the facts make out such a case?

It is not pretended that appellee expressly dedicated this longitudinal strip of its tracks to the public for a highway. The public's user of it was neither exclusive nor adverse; and, no matter how long continued, would not prove either an implied dedication or a prescriptive right. *Baltimore, etc., R. Co. v. City of Seymour*, 154 Ind. 17. The first stranger took upon himself the risk of all injuries short of those wilfully inflicted. So did the thousandth stranger, unless it be held that appellee, although there was not the

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slightest impairment of its title and right of possession, was compelled to treat its own private land as a public highway where it was not. The first stranger did not have permission to travel along the tracks; the thousandth did have. But permission to do what? To do exactly what the first did without permission, to travel along the tracks, assuming all hazards except wilfulness. With respect to the last stranger, no more than to the first, could appellee be guilty of negligence, for to neither did appellee owe the duty of exercising care to keep him out of danger.

The doctrine of *Lingenfelter v. Baltimore, etc., R. Co.*, 154 Ind. 49, is applicable and controlling. The public, with the company's acquiescence, had created and used a foot-path through the railroad yards. Near the path was an ash-pit. Appellant charged that the company negligently obstructed the path by leaving a car standing directly across it, and that appellant in the night-time was misled by the position of the car and fell into the pit. It thus appears that negligence was claimed both with respect to the condition of the premises and the operation of the railroad. The court said: "Appellee, under the circumstances in this case, as the authorities affirm, owed no duty to appellant to refrain from obstructing the path by placing the car, as it did, upon its tracks situated on its own grounds, which were used in connection with the particular business in which it was engaged. Neither did the duty rest upon it, under the circumstances, to place signals of danger at or near the pit in order that a mere licensee, like appellant, passing over these grounds in the night-time, might be warned, and thereby avoid falling into such pit."

The facts in this case are quite similar to those in *Cleveland, etc., R. Co. v. Tartt*, 64 Fed. 823, 12 C. C. A. 618: "The decedent, accompanied by his son, was, when killed, walking on or dangerously near to the track of the company. He was not on or near any highway or street crossing. He was traveling along the right of way for his own convenience

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without any invitation, express or implied, and with knowledge of the danger to life and limb from passing trains. It is true that he was killed while attempting to rescue his son from impending peril, but he had, by his own voluntary act, brought his son into a situation of danger, which gave rise to the peril. The only excuse offered for such conduct was that the defendant had suffered other people to travel along its right of way without interference or objection. He was traveling upon the defendant's right of way, not for any purpose of business connected with the railroad, but for his own convenience, as a footway, in reaching the village of Venice. The right of way was the exclusive property of the defendant, upon which no unauthorized person had the right to be for any purpose. It was a place of known danger, and there was nothing to exempt the decedent from the character of a wrongdoer and trespasser in traveling along the right of way further than the implied consent of the defendant arising from its failure to interfere with the previous like practice by others. But because the defendant did not enforce its rights, and warn people off its premises, no right was thereby acquired to use its roadbed as a place for public travel. At most, it was used by sufferance, which amounted to no more than a mere naked license, and imposed no obligation on the part of the owner to provide against the danger of accident. The person who used the right of way for his convenience went there at his own risk, and enjoyed the implied license, with its attendant perils. *Crane Elevator Co. v. Lippert*, 24 U. S. App. 176, 11 C. C. A. 521, 63 Fed. 942. The decedent, then, stood in no more favorable position than that of a wrongdoer or trespasser. He was at the time of the accident in the exercise of no legal right, and at most was in the enjoyment of a naked license implied from the previous use of the right of way by others; and the rights and obligations of the decedent and the company are to be measured as in the case of parties thus situated. Where both parties are equally in the position of right which is enjoyed by each in-

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dependently of the other, the plaintiff is only bound to show that the injury was occasioned by the negligence of the defendant, and that he exercised ordinary care to avoid it. But where the plaintiff is a wrongdoer or trespasser, or is in the enjoyment of a naked license for his own convenience, without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring and proving that the injury was wilfully inflicted, or that it was caused by negligence so gross as to authorize the inference of wilfulness."

We approve the statement of the rule in 3 Elliott on Railroads §1250: "It is held by some of the courts, however, that if a railroad company licenses or acquiesces in the use of its track or premises by others it must exercise reasonable care not only to avoid injuring them after they are discovered to be in danger but also to keep a careful lookout to discover and avoid injury to all who may be expected to be upon their right of way or premises. This rule, especially when applied in favor of those who walk along a railroad track between crossings, seems to us to be not only contrary to the weight of authority but also impracticable and in violation of the true principle that should govern such cases. If it be true, as generally conceded, that a licensee takes his license subject to the 'concomitant risks and perils,' he must surely take it subject to the use of the road in the manner in which it was used at the time the license was granted, that is, subject to the running of trains in the ordinary manner without any special reference to him, and he occupies, therefore, to this extent, substantially the position of a trespasser. In other words, the company owes him no duty of active vigilance to specially look out for and protect him, for he must know that his license is subject to all risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted and that the company assumes no new obligation or duty. Indeed, it seems to us that he is bound to know that a railroad company has no power to license the use of its tracks in such a

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manner as to interfere with its duties to the public as a common carrier. If it owes a duty to every bare licensee to run its trains with reference to him, to look out for him, to signal, to slow up and, perhaps, to stop wherever it has reason to expect him, it can do little else, its trains can not be on time and the traveling public must suffer. It certainly is not obliged to patrol its tracks from one end to the other to keep off trespassers and to prevent those who use it longitudinally from claiming a license on the ground of acquiescence. It seems to us, therefore, that the only duty which it owes to such persons, whether they are trespassers or bare licensees, is not wilfully or wantonly to injure them but to use reasonable care to avoid injury to them after their danger is discovered. It seems to us also that some of the courts beg the question when they say that the company must keep a lookout and use care to discover and protect persons on the track where they may be expected, although not at a crossing or the like. Is the company bound to expect them at any such place, and to run its trains with reference to them? Is not the assumption that such duty rests upon the company an undue assumption? The just and reasonable assumption would seem to be that they will not be on the track when trains are passing or, if they are, that, as they take their license subject to 'concomitant perils,' they will look out for their own safety without special warning or change by the company in the manner of using its road, and that it may act on this assumption until it discovers their danger."

Expressions in some of our cases, as in *Louisville, etc., R. Co. v. Phillips*, 112 Ind. 59 (2 Am. St. 155), on pp. 66, 67, which hold or seem to hold a contrary doctrine, are disapproved.

As no actionable negligence is disclosed by the complaint, it is unnecessary to consider the quality of appellant's care to save herself from injury.

Judgment affirmed.

Dowling, J., did not participate.

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159	136

157	690
160	27
160	589
157	690
161	102

157	690
163	523
163	615

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167	546
168	447
168	459
168	473

157	690
171	600

## SOUTHERN INDIANA RAILWAY COMPANY v. PEYTON, ADMINISTRATOR.

[No. 19,519. Filed Oct. 29, 1901. Rehearing denied Feb. 27, 1902.]

**NEGLIGENCE.—Pleading.—Contributory Negligence.—Statutes.—Application.**—The act of 1899 (Acts 1899, p. 58, §859 Burns 1901), providing that in all actions for damages arising from personal injury or death it shall not be necessary to allege or prove freedom from contributory negligence on the part of plaintiff, or on the part of the person for whose injury or death the action is brought, applies to a cause of action existing at the time of its passage, where the suit was not commenced until after the act took effect. *pp.* 692, 693.

**SAME.—Pleading.—Contributory Negligence.**—Under the act of 1899 (Acts 1899, p. 58, §859 Burns, 1901), the plaintiff in an action for personal injury is required to allege and prove by a preponderance of the evidence that the defendant's negligence was the proximate cause of his injuries, and, if he has by his own conduct forfeited his right of recovery, such delinquency, when not disclosed by plaintiff, if made available to the defendant, must be established as a matter of defense by a like preponderance of the evidence. *pp.* 693, 694.

**SAME.—Pleading.—Contributory Negligence.—Presumptions.**—No adverse presumptions arise because of the failure of plaintiff to allege freedom from contributory negligence in an action for personal injuries or death. *p.* 694.

**SAME.—Pleading.—Contributory Negligence.**—A complaint in an action for the death of a railroad engineer, caused by a collision with defendant's train which was being operated over a portion of the line on which decedent was employed, is not bad for failing to allege that decedent, before attempting to pass the point of junction, stopped the train and looked and listened, since if such failure to stop amounted to contributory negligence it was matter to be pleaded in defense. *p.* 694.

**APPEAL AND ERROR.—Waiver.**—Where no separate presentation is made on appeal to an objection to the action of the court in overruling a motion to direct a verdict for defendant, it will be deemed as waived. *p.* 695.

**VERDICT.—Answers to Interrogatories.—Presumption.**—A general verdict for plaintiff in an action for the death of a railroad engineer will not be reversed on answers to interrogatories tending to show contributory negligence on the part of deceased, where such answers may be overcome by reasonable presumptions in favor of the general verdict. *pp.* 695–700.

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**TRIAL.—Instructions.—Complaint.**—Where both paragraphs of a complaint stated a good cause of action it was not error for the court to instruct the jury that if plaintiff had proved by a fair preponderance of the evidence the material allegations of either paragraph of her complaint she was entitled to recover. *pp. 700, 701.*

**SAME.—Instructions.**—In the trial of an action for death caused by the alleged negligence of defendant the court is not required to embody all minor and unfavorable facts, or facts in support of the defendant's theory, in its instructions, and available error cannot be predicated upon such omission, where the desired instructions were not tendered by defendant. *p. 701.*

From Martin Circuit Court; *H. Q. Houghton*, Judge.

Action by Maude E. Peyton, administratrix of the estate of George J. Peyton, deceased, against the Southern Indiana Railway Company for the death of decedent, caused by the alleged negligence of defendant. From a judgment for plaintiff, defendant appeals. *Affirmed.*

*F. M. Trissal, J. H. Shea, C. E. Wood, J. B. Marshall* and *L. J. Hackney*, for appellant.

*W. W. Ireland, J. W. Ogdon, E. Inman, B. K. Elliott, W. F. Elliott* and *F. L. Littleton*, for appellee.

**HADLEY, J.**—The Evansville and Indianapolis Railroad Company owns and operates a railroad running north and south by the town of Elnora, in Daviess county, at which place it maintains a station. The Southern Indiana Railway Company, appellant, owns and operates a railroad running east and west from Elnora to Westport, in Decatur county. The latter company uses the former's Elnora station, which it reaches, from the north, by means of passing its trains over the north stem of a Y onto the main track of the Evansville and Indianapolis Railroad Company, thence backing down to the station, and thence regaining its own track by heading out on the south stem of the Y. On August 24, 1898, as appellant's passenger train number one, headed in a northerly direction, was in the act of passing from the Y to the main track of the Evansville and Indianapolis Railway Company, it collided with the latter's south



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bound locomotive, drawing its passenger train number thirty-three, mortally injuring George J. Peyton, appellee's intestate, who was the engineer in charge of said train thirty-three. This action is by Peyton's legal representative to recover damages for the alleged negligent causing of his death.

The complaint is in four paragraphs to each of which a demurrer was overruled. Trial by jury, verdict and judgment for appellee. Errors are assigned upon the overruling of the demurrers and motion for a new trial. The objections urged to the sufficiency of the complaint are common to each paragraph. The basis of these objections seems to be the absence from the second paragraph of any averment that the decedent was free from contributory fault, the insufficiency of such averments in the first, third, and fourth paragraphs, and the natural inference of contributory negligence, arising from the want of an averment in all the paragraphs that the decedent stopped his train, and looked and listened before attempting to pass the intersecting point of said railroads. The cause of action accrued prior, and this suit was commenced subsequent to, the taking effect of the act of 1899 (Acts 1899, p. 58), which shifts the burden of proving contributory negligence to the defendant. It is claimed (1) that this act is unconstitutional, and (2) if valid, that it does not apply to this case.

The constitutionality of the act has already been affirmed. *Indianapolis St. R. Co. v. Robinson, ante*, 232. And we can not concede that the act does not apply to this case. The statute reads: "That hereafter in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought. Contributory negligence, on the part of the



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plaintiff, or such other person, shall be a matter of defense, and such defense may be proved under the answer of general denial, *Provided*, That this act shall not affect pending litigation."

Remedial statutes, such as this, which affect only the procedure and practice of the courts in the enforcement of a right, and which do not impair the right itself, or wholly destroy a preëxisting remedy, are retroactive in the sense that they must be applied to causes of action existing at the time of their passage in all cases where the suit is subsequently commenced. Endlich on Int. of Stat., §§285, 286 and 287; *Connecticut, etc., Ins. Co. v. Talbot*, 113 Ind. 373, 378, 3 Am. St. 655; *Logan v. Logan*, 77 Ind. 558, 563; *Ralston v. Lothain*, 18 Ind. 303; *City of Indianapolis v. Imberry*, 17 Ind. 175, 179; *Collier v. State, ex rel.*, 10 Ind. 58; *Judkins v. Taffe*, 21 Ore. 89, 27 Pac. 221; *Howard v. Moot*, 64 N. Y. 262; *State v. Shreves*, 81 Iowa 615, 622, 47 N. W. 899; *Wallace v. Western, etc., Co.*, 104 N. C. 442, 10 S. E. 552.

The rule springing from such legislation seems to be that litigants must prosecute, or defend, in the manner prescribed at the time the suit is entered, without reference to when the cause of action accrued, or the character of previously existing forms of procedure, though it may turn out that present modes are less advantageous to one of the parties; the practice and procedure of courts being continuously subject to legislative control. Endlich on Int. of Stat., §285, and authorities cited.

The statute before us does not in any manner excuse or relieve the plaintiff from the consequences of contributory negligence long recognized by the law, nor make the presence of concurrent fault less effective to the defendant in escaping liability. Its obvious purpose was to restore to litigants in such cases, the just and reasonable rule of the common law as interpreted by the English courts, and from which this court had radically departed. Under the ancient rule alluded to, and which is adhered to in most of the states of the

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Union, the plaintiff, in such cases, is required to allege and prove by a preponderance of evidence that the defendant's negligence was the proximate cause of his injuries, and if he has by his own conduct forfeited his right of recovery, this delinquency, when not voluntarily disclosed by the plaintiff, if made available to the defendant, must be established by him as a matter of defense, by a like preponderance. Such is the full meaning of the statute under consideration, and it must therefore be held to govern the pleadings and procedure in this case. Applying the statute of 1899 to the complaint, and the question arising upon the total absence of any averment in the second paragraph and upon the insufficiency of averments in the other paragraphs of freedom from contributory negligence becomes immaterial.

With respect to appellant's second proposition we deem it proper to say that no adverse inference will arise upon a pleading from the absence of unnecessary averments. Under the statute it was not necessary for the plaintiff to allege and prove the decedent's freedom from contributory negligence. Railroad engineers, like persons in all other vocations, are presumed to do what the law requires of them; and if due care required him to stop his train, and look and listen before attempting to pass the point of junction, if any presumption will arise from the absence of an averment as to the fact, it must be that he did stop it. If he did not stop it, his transgression, if accounted contributory negligence, was a matter of defense that should be established by evidence, not by presumptions.

At least two of the paragraphs of complaint show that the decedent's train was due at the Elnora station at 11:50, and that appellant's train was due at the same place at 11:52 a. m.; and it is averred that the decedent's train was running five minutes late. From these facts it is urged that the complaint reveals culpable negligence on the part of the decedent, in that he approached and attempted to pass the place of intersection, with the knowledge that appellant's

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train was due to be on his track at that particular time and place, without first stopping his train, or taking any other precautions to avoid the danger reasonably to be expected. We cannot admit the premise necessary to the validity of the argument. It appears from the complaint that appellant's Y is situate one-fourth of a mile north of the Elnora station and nothing appears as to when appellant's train was due on the Y at the point where the collision occurred, or that the decedent knew when it was due there. If appellant's train was on time, and proceeded without stopping, on the Y, in violation of its alleged duty, and without unnecessary delay, we would be unable to say judicially that it could have switched its train onto the Evansville and Indianapolis Railway Company's track, and backed it down to the station in three minutes; and yet this would be necessary in charging the decedent with knowledge that appellant's train was due at the place of collision when he arrived there with his train.

There are other questions here discussed which are ineffectual to impair the complaint, and which more properly arise upon the answers to interrogatories. Certain other questions suggested should have been reached by motion to make more specific. We think each paragraph of the complaint was sufficient to withstand a demurrer.

Upon the conclusion of the plaintiff's evidence appellant unsuccessfully moved the court to direct the jury to return a verdict in its favor. Appellant was likewise unsuccessful in its motion for judgment in its favor upon the answers to interrogatories. The first of these rulings has received no separate presentation, and objection to it is only suggested in general terms, and it must, therefore, under the oft repeated rule of this court, be deemed as waived. Upon the second, the proposition is that the findings of fact in the answers to interrogatories establish contributory negligence in plaintiff's decedent. The facts disclosed by such answers may be thus summarized: Under some agreement, the terms

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of which are not fully disclosed, but which were known to the employes of both companies, the appellant and the Evansville and Indianapolis Railroad companies made common use of the Elnora station for the receipt and discharge of passengers, in the mode set forth in the opening of this opinion. A stipulation in this agreement required the defendant to cause its employes in charge of its trains, before running a train from its Y onto the main track of the Evansville and Indianapolis Railway Company, to stop and send forward a flagman to warn any train approaching on the Evansville and Indianapolis Railway Company's track. This agreement was known to the employes of both companies and had been acted upon and observed for more than six months before the accident. On the current time-table of the Evansville and Indianapolis Railway Company was printed the following as special instructions: "C. When tracks of two railroads cross each other, or in any way connect at common grades, all trains or engines passing over such tracks shall come to a full stop before reaching such crossing. \* \* \* i. S. I. (Southern Indiana) railway trains and engines will occupy main track inside yard limits at Elnora; in time of all trains, have your train under full control. \* \* \* k. S. I. R. R. trains between Elnora and Washington will be governed by time-table and special instructions of the E. & I. R. R. Conductors and engineers must supply themselves with E. & I. time-tables." The following rule of the Evansville and Indianapolis Railway Company was also in force: "All trains must approach the end of double tracks, junctions, and railroad crossings at grade, prepared to stop, and must not proceed until the switches, or signals are seen to be right, or the track is plainly seen to be clear. Where required by law all trains must stop."

George Peyton, the deceased, upon reaching the northern yard limit, which was 900 feet north of the fatal junction, had and kept his train under full control, running at the rate of twelve to fifteen miles an hour; from said northern limit

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neither he nor his fireman could have seen the defendant's approaching train. As Peyton approached the intersection, with his train under full control, appellant's switch target at the place was in such position as to indicate to him a free and safe track, and he did not stop his train before the collision. Those in charge of appellant's train had not sent forward a flagman to warn Peyton of their train's approach, nor had they set the switch for passage of their train onto the track occupied by Peyton, and without stopping continued to run their train forward until the same occupied such a part of the Evansville and Indianapolis Railway Company's track as precluded the passage of Peyton's train without collision. Peyton knew that the appellant's train was due at the junction at the time the collision occurred. The Evansville and Indianapolis Railway Company's rule C did not require Peyton to stop his train at the intersection, and ascertain whether another train was about to come upon his track. In the collision that resulted, Peyton was killed, and the driving rods and cylinder of defendant's engine on the side of contact were torn away. The contention upon these facts is that as Peyton ran his train, which was five minutes late, at a speed of twelve to fifteen miles an hour, and reaching the point of collision on the time of the other train, without stopping his train and making an effort to ascertain as to the other's presence, in violation of the established rules of his employer, his conduct must as matter of law be adjudged as negligence contributory to his death. This contention must be brought within the limits of the rule, that all reasonable presumptions must be indulged against the special answers, and in support of the general verdict, and if the general verdict, thus aided, is not in irreconcilable conflict with the answers, it must stand. *City of South Bend v. Turner*, 156 Ind. 418; *Roush v. Roush*, 154 Ind. 562; *Consolidated Stone Co. v. Summit*, 152 Ind. 297.

The reason for the rule as stated in *Turner's* case, *supra*, is "that the jury is required to pronounce upon all the issu-

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able facts proved in the case, while the court in testing the force of isolated facts disclosed by answers to interrogatories, does not know, and cannot know what other facts touching the same matters were rightfully before the jury to justify their verdict." Under the rule the effect of the general verdict is that upon all the proved facts the decedent was free from contributory fault, and the appellant guilty of negligence which was the proximate cause of his death.

It is shown that rule or specification C which appears in a body of special instructions printed upon the current timetable of the Evansville and Indianapolis Railway Company, imposing upon the responsible agents in charge of trains, when tracks of two railroads cross each other, "or in any way connect at common grade, to bring all trains passing over said roads to a full stop before reaching *such crossings*" as a part of general regulations, was in force at the time of the accident. The words of the rule are *not* before reaching *such connections* or crossings. It is further shown that when Peyton reached the point of intersection he knew that appellant's train was then due at that place, and that he did not stop his train before the collision. From these facts we are asked to hold as against the general verdict, as a matter of law, that the deceased was guilty of contributory negligence. This we can not do without pronouncing these facts an unsurmountable barrier to recovery.

As opposed thereto it appears from the answers that, under the running arrangement of the two companies, which was known to the employes of both, and which had been faithfully observed by the defendant's employes in charge of its trains, for more than six months next before the collision, it was the duty of the defendant to stop its trains on the Y, and before entering upon the track of the Evansville and Indianapolis Railway Company, to send forward a flagman to warn any train approaching on the latter road. Associated with the known duty of appellant, its uniform observance, and rule C above set forth, was rule ninety-four of

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the Evansville and Indianapolis Railway Company, which was in like manner in force for the government of its trains, to wit: "All trains must approach the end of double track junctions, railroad crossings at grade, and draw bridges, prepared to stop, and must not proceed until the switches or signals are seen to be right, or the track is plainly seen to be clear. Where required by law all trains must stop." Furthermore when Peyton reached the yard limits, 900 feet distant, he had and kept his train under full control; appellant's usual flag of warning was absent; its switch for passage of its trains to the track of the Evansville and Indianapolis Railway Company had not been set, and its switch target was so placed as to indicate to him a clear and safe track. It is also found as facts in answer to appellant's interrogatories that said rule C did not require Peyton to stop his train at said intersection and ascertain if another train was about to head out upon his track, and that he did not know, and could not by the exercise of reasonable care have known, that appellant's train was about to head out upon it.

We cannot assume any of these latter findings to be conclusions. They were invited by the appellant and permitted by the court as pertinent to the evidence. We must therefore assume on the faith of the general verdict that upon competent and sufficient evidence the jury found that there were other rules and regulations of the company, not before us, and known to the defendant, which modified, or suspended, or waived the application of rule C to the Elnora junction; and also assume, if necessary, that, as construed by the parties themselves, the words of rule C "in any way connect at common grade" was not a term equivalent to "crossing of two railroads"; and also that the parties construed rule ninety-four to mean that when an engineer approaches a railroad junction such as this, and as distinguished from a railroad crossing, with his train under control, and the switch is seen to be right, and the track plainly clear, he may proceed without stopping, and without negligence. Supported by



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such presumptions, and the general verdict stands unshaken by the special answers. *Town of Poseyville v. Lewis*, 126 Ind. 80; *Ohio, etc., R. Co. v. Trowbridge*, 126 Ind. 391; *Rogers v. Leyden*, 127 Ind. 50, 59; *Louisville, etc., R. Co. v. Schmidt*, 134 Ind. 16.

Appellant complains of instructions numbered five, seven, eight, nine, and twelve, which were given to the jury upon request of the appellee. By number five the jury were told if the plaintiff had proved by a fair preponderance of the evidence the material allegations of either paragraph of her complaint, she was entitled to recover. As we have hereinbefore held that each paragraph of the complaint stated a good cause of action, it follows that this instruction was correct. Number seven was to the effect that if the jury believed from the evidence that by the rules and regulations existing between the two railroad companies it was the duty of the defendant before entering upon the track of the Evansville and Indianapolis Railway Company to stop its trains before reaching the track of the Evansville and Indianapolis Railway Company, and to send forward a flagman to the latter track to give notice and warning to approaching trains, and that at the time of the accident the employes of the defendant did not stop their train, or send forward a flagman before entering upon the track of the Evansville and Indianapolis Railway Company and that by reason of such failure the train of the Evansville and Indianapolis Railway Company without fault or negligence of those in charge collided with appellant's train, and that such collision was caused by the negligence of those in charge of appellant's train and without fault of those operating the Evansville and Indianapolis Railway Company's train, and Peyton was thereby killed, they should find for the plaintiff. Number eight affirmed that it was the duty of the employes of the defendant, in approaching, and before entering upon the Evansville and Indianapolis Railway Company's track, to exercise ordinary care to ascertain the presence of trains on the Evans-



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ville and Indianapolis Railway Company's track, that might lead to a collision, and if it was shown by the evidence that the employes in charge of the defendant's train ran said train upon the Evansville and Indianapolis Railway Company's track without the exercise of such care, and the collision and death of Peyton was caused by such negligence, and without fault on his part, there should be a recovery. The ninth and twelfth are of the same general import,—the latter more fully reciting the facts in issue, and which upon the contingency of being proved, the jury was informed, would entitle the plaintiff to recover.

It is objected that these instructions single out and give undue prominence to certain acts and omissions of the defendant, which are declared by the court to constitute negligence, and which were calculated to lead the jury away from a consideration of all the facts and circumstances proved in the case, and in effect misled the jury from finding from all the evidence the fact of negligence, or non-negligence. We do not think the instructions are subject to this objection. In each instance the jury is informed that it must find the existence of the facts recited before it can find negligence. It is the right of each litigant to have the law declared upon the issuable facts supportive of his theory which the evidence tends to prove, and if such facts are found to be established, and are sufficient in law to constitute a cause of action or defense, it is proper for the court so to advise the jury. In such presentation it is not necessary to embody all minor and unfavorable facts, or facts in support of the adversary's theory. If the latter desires a counter presentation from his standpoint he must request it.

Judgment affirmed.

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**FIRST NATIONAL BANK OF WORCESTER, MASSACHUSETTS, v. THE MIDLAND STEEL COMPANY.**

[No. 19,221. Filed January 2, 1901.]

From Delaware Circuit Court; *G. H. Koons*, Judge.

Action by First National Bank of Worcester, Mass., against the Midland Steel Company, on note. From a judgment in favor of defendant, plaintiff appeals. *Reversed.*

*R. Warner* and *A. W. Brady*, for appellant.

*J. W. Ryan*, *W. A. Thompson*, *B. K. Elliott*, *W. F. Elliott* and *F. L. Littleton*, for appellee.

DOWLING, C. J.—Action by appellant against appellee upon two promissory notes. The complaint is in fourteen paragraphs, each of which alleges the execution by the appellee of the notes sued upon. A demurrer to each paragraph was sustained, and the appellant refusing to amend, judgment was rendered in favor of the appellee. Error is assigned upon the rulings of the court on the several demurrers.

The notes sued upon differ from that constituting the cause of action in the case of *Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581, only in the circumstance that they were payable at a national bank in the State of Indiana. The questions presented and discussed in the briefs of counsel are the same as those involved in *Second Nat. Bank v. Midland Steel Co.*, *supra*, and upon the authority of that case the judgment of the lower court is reversed, with instructions to overrule the demurrers to the several paragraphs of the amended complaint, and for further proceedings in accordance with this opinion.

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**CASON ET AL. v. WILLS ET AL.**

[No. 19,349. Filed June 21, 1901.]

From Boone Circuit Court; *J. V. Kent*, Judge.

Action by Charles G. Wills against Samuel L. Cason and others to enforce lien for street improvements. From a judgment for plaintiffs defendants appeal. *Affirmed.*

*T. J. Terhune* and *C. M. Zion*, for appellants.

*P. H. Dutch*, for appellees.

MONKS, C. J.—The questions in this case are the same as those presented in *Martin v. Wills*, *ante*, 153, and upon the authority of that case this case is affirmed.

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Goppert v. Beal.

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HOGSHIRE v. WILLS ET AL.

[No. 19,850. Filed June 21, 1901.]

From Boone Circuit Court; *J. V. Kent*, Judge.

Action by Charles G. Wills and others against Mary E. Hogshire to enforce lien for street improvements. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

*T. J. Terhune* and *C. M. Zion*, for appellant.

*P. H. Dutch*, for appellees.

MONKS, C. J.—The questions for decision in this case are the same as in the case of *Martin v. Wills*, ante, 158. On the authority of that case the judgment in this case is affirmed.

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CITY OF INDIANAPOLIS v. HELTZEL.

[No. 19,483. Filed October 8, 1901.]

From Marion Superior Court; *Vinson Carter*, Judge.

Action by Amos C. Heltzel against the City of Indianapolis to enjoin the letting of a contract for street improvements. From a judgment for plaintiff, defendant appeals. *Reversed*.

*J. W. Kern*, *J. E. Bell*, *B. K. Elliott*, *W. F. Elliott* and *F. L. Littleton*, for appellant.

HADLEY, J.—The pleadings and questions involved in this appeal are identically the same as those involved in *City of Indianapolis v. Holt*, 155 Ind. 222, and upon the authority of that case the judgment is reversed with instructions to sustain the demurrers to the complaint.

Baker, J., and Hadley, J., dissent for reasons set forth at length in dissenting opinions in the Holt case.

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GOPPERT v. BEAL ET AL.

[No. 19,482. Filed October 22, 1901.]

From St. Joseph Circuit Court; *Lucius Hubbard*, Judge.

Petition by Daniel W. Beal and others for public ditch, Herman F. Goppert opposed the petition. From a judgment for Beal, Goppert appeals. *Affirmed*.

*Stuart McKibben*, for appellant.

*T. E. Howard* and *J. G. Orr*, for appellees.

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**Long v. Smith.**

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MONKS, C. J.—This was a proceeding to establish a drain extending into three counties, under the provisions of §§5677-5680 Burns 1901, 4308-4311 R. S. 1881, and Horner 1897. Appellant seeks a reversal of the judgment of the court below against him on the ground that the petition was not signed by any person owning land liable to be assessed for the construction of said drain in one of the counties into which the same extends.

The court below, after hearing the evidence on this question, found against appellant. We have carefully examined the evidence and find that the same sustains the finding of the court. Judgment affirmed.

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**LEEDS ET AL. v. DEFREES.**

[No. 19,573. Filed November 19, 1901.]

From Laporte Superior Court; *H. B. Tuthill*, Judge.

Action by Calvert H. Defrees against Amelia Leeds and others to enforce lien for street improvements. From a judgment for plaintiff, defendants appeal. *Affirmed.*

*J. F. Gallaher* and *C. W. Smith*, for appellants.

*M. T. Kreuger*, *C. R. Collins* and *J. B. Collins*, for appellee.

JORDAN, J.—Appellees successfully prosecuted this action in the lower court to foreclose a lien arising out of an assessment for the improvement of a public street in Michigan City.

The identical questions are involved as were presented and decided by this court in *Leeds v. Defrees, ante*, 392, and on the authority of that case these questions must be decided adversely to the contentions of appellants. The judgment is, therefore, in all things affirmed.

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**LONG ET AL. v. SMITH.**

[No. 19,603. Filed November 20, 1901.]

From Marion Superior Court; *J. M. Leathers*, Judge.

Action by William C. Smith against Robert W. Long and others to enforce lien for street improvements. From a judgment for plaintiff, defendants appeal. *Affirmed.*

*S. N. Chambers*, *S. O. Pickens*, *C. W. Moores* and *R. F. Davidson*, for appellants.

HADLEY, J.—The record in this case presents only the identical questions decided at this term in *Shank v. Smith, ante*, 401, and upon the authority of that case the judgment in this case is affirmed.

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Blinks v. Defrees.

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THOMPSON ET AL. v. SMITH.

[No. 19,604. Filed November 21, 1901.]

From Marion Superior Court; *Vinson Carter*, Judge.

Action by William C. Smith against Thomas L. Thompson and others to enforce lien for street improvements. From a judgment for plaintiff, defendants appeal. *Affirmed*.

*S. N. Chambers, S. O. Pickens, C. W. Moores, and R. F. Davidson*, for appellants.

HADLEY, J.—The record in this case presents only the identical questions decided at this term in *Shank v. Smith*, ante, 401, and upon the authority of that case the judgment in this case is affirmed.

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THE STATE, EX REL. PEIFER, v. FISHER, MAYOR, ET AL.

[No. 19,650. Filed November 21, 1901.]

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Action by Maurice Peifer against Manuel M. Fisher, Mayor of City of Mishawaka, and others for writ of mandate. From a judgment for defendants, plaintiff appeals. *Affirmed*.

*T. E. Howard and E. A. Howard*, for appellant.

DOWLING, J.—Application for a writ of mandate to compel the mayor and common council of the city of Mishawaka to prefer charges against the appellant, etc. Error is assigned upon the ruling of the court sustaining a demurrer to the complaint and alternative writ.

The complaint is similar in all respects to that in *State, ex rel., v. Fisher*, ante, 412, and on the authority of that case the judgment is affirmed.

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BLINKS ET AL. v. DEFREES.

[No. 19,574. Filed November 22, 1901.]

From Laporte Superior Court; *H. B. Tuthill*, Judge.

Action by Calvert H. Defrees against William Blinks and others to enforce a lien for street improvements. From a judgment for plaintiff, defendants appeal. *Affirmed*.

*J. F. Gallaher and C. W. Smith*, for appellants.

*M. T. Kreuger, C. R. Collins and J. B. Collins*, for appellee.

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**Hay v. Smith.**

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**JORDAN, J.**—Appellees successfully prosecuted this action in the lower court to foreclose a lien arising out of an assessment for the improvement of a public street in Michigan City.

The identical questions are involved as were presented and decided by this court in *Leeds v. Defrees*, ante, 892, and on the authority of that case these questions must be decided adversely to the contentions of appellants. The judgment is, therefore, in all things affirmed.

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**ROACH ET AL. v. SMITH.**

[No. 19,606. Filed December 10, 1901.]

From Marion Superior Court; *J. M. Leathers*, Judge.

Action by William C. Smith against William M. Roach and others to enforce a lien for street improvements. From a judgment for plaintiff, defendants appeal. *Affirmed.*

*S. N. Chambers, S. O. Pickens, C. W. Moores and R. F. Davidson*, for appellants.

**HADLEY, J.**—The record in the above cause presents only the identical questions decided in *Shank v. Smith*, ante, 401, and upon the authority of that case the judgment in this case is affirmed.

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**DAVIS v. SMITH.**

[No. 19,607. Filed December 10, 1901.]

From Marion Superior Court; *J. L. McMasters*, Judge.

Action by William C. Smith against Susan F. Davis to enforce a lien for street improvements. From a judgment for plaintiff, defendant appeals. *Affirmed.*

*S. N. Chambers, S. O. Pickens, C. W. Moores and R. F. Davidson*, for appellant.

**HADLEY, J.**—The record in the above cause presents only the identical questions decided in *Shank v. Smith*, ante, 401, and upon the authority of that case the judgment in this case is affirmed.

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**HAY ET AL. v. SMITH.**

[No. 19,608. Filed December 10, 1901.]

From Marion Superior Court; *J. L. McMasters*, Judge.

Action by William C. Smith against Oliver P. Hay and others to enforce lien for street improvements. From a judgment for plaintiff, defendants appeal. *Affirmed.*

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Rowland v. City of Greencastle.

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*S. N. Chambers, S. O. Pickens, C. W. Moores and R. F. Davidson,*  
for appellants.

HADLEY, J.—The record in the above cause presents only the identical questions decided in *Shank v. Smith, ante*, 401, and upon the authority of that case the judgment in this case is affirmed.

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STEVENSON v. SMITH.

[No. 19,605. Filed December 13, 1901.]

From Marion Superior Court; *J. L. McMasters*, Judge.

Action by William C. Smith against James Stevenson to enforce a lien for street improvements. From a judgment for plaintiff, defendant appeals. *Affirmed.*

*S. N. Chambers, S. O. Pickens, C. W. Moores and R. F. Davidson,*  
for appellant.

HADLEY, J.—This record presents the identical questions decided in *Shank v. Smith, ante*, 401, and upon the authority of that case the judgment in this case is affirmed.

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ROWLAND v. CITY OF GREENCASTLE.

[No. 18,888. Filed January 9, 1902.]

From the Putnam Circuit Court; *S. M. McGregor*, Judge.

Action by City of Greencastle against Daniel B. Rowland for violating a city ordinance. From a judgment for plaintiff, defendant appeals. *Reversed.*

*H. C. Lewis, B. F. Corwin, J. E. Lamb, J. T. Beasley, W. W. Woolen and Evans Woollen,* for appellant.

*G. C. Moore, T. T. Moore and J. S. McClary,* for appellee.

DOWLING, J.—The questions presented in this cause are substantially the same, and are between the same parties as in the case of *Rowland v. City of Greencastle, ante*, 591.

On the authority of that case the judgment is reversed, with directions to overrule the demurrer to the second paragraph of the appellant's answer, to sustain the motion for a new trial, and for further proceedings in accordance with said opinion.

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2. *When no Appeal Lies.—Action Within Jurisdiction of Justice of the Peace.—Statute.*—The provision of §6 of the act of 1901 (Acts 1901, p. 565), denying appeals to the Supreme or Appellate Court in civil cases within the jurisdiction of a justice of the peace, except as provided in §8 thereof, applies to appeals from judgments rendered before the act took effect taken thereafter. *Lake Erie, etc., R. Co. v. Watkins*, 600.
3. *When No Appeal Lies.—Action Within Jurisdiction of Justice of the Peace.*—Under §5813 Burns 1901, giving justices of the peace exclusive original jurisdiction in actions against railroad



**APPEAL AND ERROR—Continued.**

companies for stock killed when the damages do not exceed \$50, and concurrent jurisdiction with the circuit court when they exceed that amount, an appeal from a judgment for \$70 in such action is within the prohibition of §6 of the act of 1901 (Acts 1901, p. 565), providing that, except in certain cases specified in §8 thereof, no appeal shall be taken to the Supreme or Appellate Court in any civil case which is within the jurisdiction of a justice of the peace.

*Lake Erie, etc., R. Co. v. Watkins, 600.*

4. *Action Begun Before Justice of the Peace.*—The fact that the constitutionality of a statute is involved does not render an action begun before a justice of the peace in which the amount in controversy does not exceed \$50 appealable to the Supreme or Appellate Court under the exception in §644 Burns 1894 relative to appeals, as such exception applies to ordinances of municipal corporations. *Colliery Engineer Co. v. American Car, etc., Co., 111.*
5. *Action to Establish Will.*—An action to secure the probate of an alleged will is an action to determine the property rights of living persons, and an appeal in such a case is not governed by §§2454, 2455 R. S. 1881, providing that appeals in matters connected with decedents estates must be perfected within forty days after final judgment. *Morell v. Morell, 179.*
6. *Right of Appeal.—Limitation.—Constitutional Law.*—The provision of §12 of the bill of rights that "all courts shall be open," etc., is fully satisfied by a trial in a court of competent jurisdiction in which the right to a jury, in proper cases, as guaranteed by the Constitution, is afforded. *Lake Erie, etc., R. Co. v. Watkins, 600.*
7. *Right of Appeal.—Limitation.—Constitutional Law.*—Under §4, article 7, of the Constitution, providing that "The Supreme Court shall have jurisdiction coextensive with the limits of the State in appeals and writs of errors, under such regulations and restrictions as may be prescribed by law" the legislature may not only, from time to time, enlarge such jurisdiction, but it may also contract the same as public policy may demand or require, and may designate the amount that may authorize an appeal, and, within reasonable limits, prescribe the class of cases in which appeals can be taken, and from what courts or tribunals they may be prosecuted. *Lake Erie, etc., R. Co. v. Watkins, 600.*
8. *Repeal of Appealing Statute.*—Prosecuting an appeal to the Supreme or Appellate Court cannot be said to be the institution of a suit within the meaning of §248 Burns 1901, providing that no suits instituted under existing laws shall be affected by the repeal thereof. *Lake Erie, etc., R. Co. v. Watkins, 600.*
9. *Repeal of Appealing Statute.*—An appeal from a judgment against a railroad company for stock killed is not for the recovery of any penalty or for the enforcement of any liability within the meaning of §248 Burns 1901, providing that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, but the same shall be treated as remaining in force for the enforcement of such penalty, forfeiture or liability. *Lake Erie, etc., R. Co. v. Watkins, 600.*
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11. *Vacation Appeal.—Parties.*—When part only of judgment defendants take a vacation appeal, under §647 Burns 1901, all of the persons jointly bound must be named in the assignment of errors as appellants. *Smith v. Fairfield, 491.*
12. *Vacation Appeal.—Parties.*—Inserting in the caption of an assignment of errors in a vacation appeal, as appellees, the names of judgment defendants jointly bound with the appellants is unwarranted by the statute relating to appeals, and is of no effect. *Smith v. Fairfield, 491.*
13. *Term Time Appeal.—Abandonment.*—Where a party in term time asks and is granted an appeal but does not file a transcript of the proceedings of the lower court in the office of the Clerk of the Supreme Court, within sixty days after filing the appeal bond, as required by §650 Burns 1901, he will be deemed to have abandoned his term time appeal. *Lake Erie, etc., R. Co. v. Watkins, 600.*
14. *Time of Taking Appeal.*—An appeal will be deemed to have been taken at the time of the filing of the transcript and assignment of errors in the Supreme Court. *Lake Erie, etc., R. Co. v. Watkins, 600.*
15. *Parties.—Drains.*—Where, in an appeal from a judgment establishing a drain, all the parties to the judgment, adverse to appellant, are not made parties to the appeal the appeal will be dismissed. *North v. Davisson, 610.*
16. *Transfer of Cause from Appellate to Supreme Court.*—Where the Supreme Court sustains a petition to transfer a cause from the Appellate Court, the decision of the Appellate Court is thereby vacated. *Payne v. Terre Haute, etc., R. Co., 616.*
17. *Transfer of Cause From Appellate Court.*—Under subdivision 2 of §10 of the act of March 12, 1901, concerning appeals, the losing party in the Appellate Court, may have his cause transferred to the Supreme Court when the opinion contravenes a ruling precedent, or involves an erroneous decision of a new question, but a transfer will not be granted on the ground that the Appellate Court has misapprehended or misstated the facts as disclosed by the record. *Barnett v. Bryce Furnace Co., 572.*
18. *Practice.*—A cause will not be reversed because of the denial of a motion for a new trial, based upon the ruling of the court in the admission and rejection of evidence, and upon newly discovered evidence, where the facts found, and the evidence in support thereof, clearly show that the merits of the cause have been fairly tried and determined. *Shedd v. Webb, 585.*
19. *Record.—Marginal Notes.*—The right to invoke the rule of the Supreme Court in reference to marginal notes on the transcript on appeal is not confined to the appellee, but the court may of its own motion enforce the rule by dismissing the appeal. *State v. Van Cleave, 608.*
20. *Record.—Bill of Exceptions.—Precipe.*—Where the precipe filed by appellant directed the clerk to prepare and certify a "full, true, and complete transcript of the proceedings, papers on file, and judgment" in the cause, the action of the clerk in certifying the original bill of exceptions was unauthorized, and the same is no part of the record on appeal. *Chestnut v. Southern Indiana R. Co., 509.*

**APPEAL AND ERROR—Continued.**

21. *Transcript.—Authentication by Clerk.*—The transcript of the record of the proceedings in the trial court must be authenticated by the seal of such court, or it will not be considered on appeal.  
*Clay Township v. Head, 240; State, ex rel., v. Webster, 508.*
22. *Record.—Amended Complaint.—Presumption.*—Where the clerk certifies that the pleading copied into the record as the amended complaint, is the amended complaint, it will not be held to be the original complaint which is found to be the same, word for word, since it was the clerk's duty to embody the amended complaint in the transcript, and to omit the original, and the presumption is that the clerk properly performed his official duty.  
*Indianapolis Union R. Co. v. Houlihan, 494.*
23. *Record.—Affidavits.*—An affidavit in support of a motion for a new trial, which affidavit is not authenticated by the signature of the trial judge, and not brought into the record by bill of exceptions, will not be considered on appeal. *Williams v. State, 94.*
24. *Record.—Receivers.*—No question is presented in an appeal from an interlocutory order refusing to appoint a receiver where the affidavits and evidence offered on the hearing of the application are not made a part of the record by bill of exceptions.  
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25. *Record.—Rejected Pleading. — Answers to Interrogatories.*—A rejected pleading and answers to special interrogatories propounded under §885 Burns 1901 can only be made a part of the record by bill of exceptions or by order of court.  
*Tilden v. Louisville, etc., Co., 532.*
26. *Record.—Rejected Pleading.—Bill of Exceptions.*—A rejected complaint and answers to interrogatories propounded to plaintiff under §385 Burns 1901, for the purpose of ascertaining whether the pleading was false, do not constitute a part of a bill of exceptions unless copied into it at full length before it is signed, or appropriately referred to and the proper place for insertion designated by the words "here insert," as required by §688 Burns 1901.  
*Tilden v. Louisville, etc., Co., 532.*
27. *Record.—Pleading.—Amendment.*—An original complaint superseded by an amended complaint, although copied in the transcript, is not a part of the record, and cannot be considered on appeal.  
*Tilden v. Louisville, etc., Co., 532.*
28. *Motions.—Record.—Bill of Exceptions.*—Pleadings stricken out on motion, copied by the clerk but not brought into the record by bill of exceptions, are not a part of the record, and questions concerning the action of the court in striking them out cannot be considered on appeal.  
*Coddington v. Canaday, 243.*
29. *Record.—Evidence.*—Where there is no order-book entry showing the filing of any bill of exceptions, and the certificate of the clerk contains nothing in reference to the incorporation of an original bill of exceptions containing the evidence, the evidence is not in the record, though what purports to be a transcript of the testimony is attached thereto.  
*Richardson v. Dawson, 187; State, ex rel., v. Webster, 508.*
30. *Evidence.—Bill of Exceptions.*—The evidence is not in the record where the record does not show that the bill of exceptions containing the evidence was ever filed.  
*City of Indianapolis v. Tansel, 463.*

**APPEAL AND ERROR—Continued.**

81. *Record.—Bill of Exceptions.—Motions.*—A motion to make the complaint more specific is not properly in the record where the motion was merely referred to in the bill of exceptions by reference to the page in the transcript where it had been copied by the clerk, without order of court, and no order of court was made that the motion should be made a part of the record without a bill of exceptions. *Pittsburgh, etc., R. Co. v. Martin, 216.*
82. *Bill of Exceptions.*—A bill of exceptions must be filed after being signed by the trial judge. *Beall v. Union Traction Co., 209; Acme Cycle Co. v. Clarke, 271; Allen v. Hamilton, 621.*
83. *Bill of Exceptions.*—A bill of exceptions filed at a subsequent term of court, without leave of court so to do affirmatively appearing from the order-book entry cannot become a part of the record on appeal. *Klein v. State, 146.*
84. *Special Bill of Exceptions.*—A special bill of exceptions under §642 Burns 1901 must show that the evidence embraced in the special bill was all of the evidence given in the cause upon the subject referred to in the questions and answers set out in the bill. *Acme Cycle Co. v. Clarke, 271.*
85. *Misconduct of Court.—Exception.—Trial.*—No question is presented on the alleged misconduct of the court in stating during the examination of a witness "I can't permit that; treat the witness fairly", where the exception was taken to the rejection of the question, and no exception was taken to the remarks of the court, nor the alleged misconduct specified as a ground for a new trial. *Chicago, etc., R. Co., v. Brown, 544.*
86. *Conclusions of Law.—Exception.*—An exception to the conclusions of law concedes that the facts upon which the conclusions were based are correctly found. *National State Bank v. Sandford Fork, etc., Co., 10.*
87. *Failure of Appellee to File Brief.*—Where the appellee fails to file a brief within the time allowed in support of the judgment, such failure may be accepted and deemed to be a confession of the errors assigned by the appellant, and the Supreme Court, in the exercise of its discretion, may reverse the judgment without considering the appeal on its merits. *Berkshire v. Caley, 1; Neu v. Town of Bourbon, 476.*
88. *Record.—Evidence.*—Questions as to the admissibility of evidence and as to instructions can not be considered on appeal, where the evidence is not in the record. *Richardson v. Dawson, 187.*
89. *Record.—Evidence.—Written Instrument.*—Where a written instrument is offered in evidence and excluded, it must be brought into the record, in order to present any question on the ruling excluding it. *Musser v. State, 423.*
40. *Instructions.—Record.*—Available error cannot be predicated upon the action of the court in refusing an instruction offered by appellant where all of the instructions are not in the record. *Diehl v. State, 549.*
41. *Instructions.—Evidence Not in Record.*—Where the evidence is not in the record, a judgment will not be reversed because of alleged erroneous instructions unless the instructions are wrong under any supposable state of facts that could have been proved under the issues. *Chestnut v. Southern Indiana R. Co., 509.*

**APPEAL AND ERROR—Continued.**

42. *Presumptions.—Evidence Not in Record.*—It will be presumed on appeal from a judgment in favor of plaintiff, in the absence of the evidence from the record, that the evidence fully sustained the averments of the complaint. *City of Indianapolis v. Tansel*, 463.
43. *Presumptions.*—Where it is not shown that all of the evidence is in the record it will be presumed on appeal that other evidence was given which justified the court in directing a verdict for defendant. *Ralya v. Atkins & Co.*, 331.
44. *Presumptions.—Evidence Not in Record.*—A cause will not be reversed on an affidavit filed in support of a motion for a new trial in an action for personal injuries that plaintiff was brought in and out of court in an invalid chair, and as soon as the trial was over he was able to walk without support, where the evidence is not in the record, since it must be presumed in favor of the action of the trial court in overruling the motion for a new trial that plaintiff testified that he could walk without support, and that he explained the use of the invalid chair so that the court in refusing to grant a new trial was satisfied that in fact no fraud had been practiced. *City of Indianapolis v. Tansel*, 463.
45. *Harmless Error.*—The sustaining of a demurrer to certain paragraphs of answer is harmless, where each answer was but the equivalent of a general denial. *Harris v. Randolph County Bank*, 120.
46. *Trial.—Harmless Error.*—Where the verdict of the jury was adverse to plaintiff upon the issue of his right to recover in an action for personal injuries, error in excluding evidence relating solely to the degree of the injury was harmless. *Chestnut v. Southern Indiana R. Co.*, 509.
47. *Trial.—Examination of Witness.—Correction of Discrepancy in Testimony.—Harmless Error.*—Where, in the trial of an action against a railroad company for damages to property caused by fire escaping from defendant's right of way, it appeared that plaintiff owned land in seven different sections that were burned over, the refusal of the court to permit counsel for defendant to ask a witness on cross-examination "Do you say it makes a difference of \$3 an acre in fifteen minutes, in the price?"—witness having testified in his examination in chief that land in a certain section was worth \$6 or \$7 an acre before the fire, and on cross-examination that it was worth \$5 an acre, was harmless, where it was shown by a subsequent answer that the witness was at the time mistaken as to the section. *Chicago, etc., R. Co. v. Brown*, 544.
48. *Harmless Error.—Instructions.*—A cause will not be reversed because of an erroneous instruction, where the answers to interrogatories affirmatively show that the general verdict was right. *Ellis v. City of Hammond*, 267.
49. *Striking Out Pleading.*—A cause will not be reversed because of the action of the court in striking out a pleading, where the pleading stricken out contained nothing but immaterial matter. *Acme Cycle Co. v. Clarke*, 271.
50. *Harmless Error.*—The sustaining of a demurrer, when a motion to strike out is the proper remedy, is harmless, where the correct result was reached. *Harris v. Randolph County Bank*, 120.
51. *Harmless Error.*—Alleged erroneous rulings of the trial court will not be considered on appeal where the legitimate evidence is

**APPEAL AND ERROR—Continued.**

sufficient to sustain a judgment, and the merits of the cause under the issues have been fairly tried.

*Harris v. Randolph County Bank*, 120.

52. *Special Finding.—Evidence.*—A finding will not be disturbed on the evidence where there is any evidence which, when considered alone, is sufficient to sustain it.

*National State Bank v. Sandford Fork, etc., Co.*, 10.

53. *Evidence.—Sufficiency.*—In an action to recover from an ex-county treasurer an excess of fees and salary, the want of evidence to support a finding that he was allowed a certain sum on a certain date is not material, where it was admitted that upon final settlement the amount received by him exceeded that to which he was entitled by the amount represented by the judgment.

*Sudbury v. Board, etc.*, 446.

54. *Receivers.—Evidence.*—The rule that the Supreme Court will not weigh the evidence on appeal has no exception in a proceeding for the appointment of receiver.

*Sheridan Brick Works v. Marion Trust Co.*, 292.

55. *Waiver of Error.*—Assignments of error not discussed on appeal are waived.

*Pittsburgh, etc., R. Co. v. Martin*, 216.

56. *Waiver.*—Where no separate presentation is made on appeal to an objection to the action of the court in overruling a motion to direct a verdict for defendant it will be deemed waived.

*Southern Indiana R. Co. v. Peyton*, 690.

57. *Directing Verdict.—Evidence.—Record.*—The action of the court in directing a verdict for defendant will be presumed to be correct on appeal, in the absence of the evidence from the record.

*Beall v. Union Traction Co.*, 209.

58. *Remittitur.*—Where, in an action against a railroad company for damages to land and personal property, caused by fire escaping from the right of way, the court erred in instructing the jury as to the measure of damages to personal property that was injured and not totally destroyed, and the damage assessed because of such erroneous instruction is ascertainable from the record, and the remainder of the verdict and judgment was not, and could not have been affected by the instruction, and is right, the court will permit the plaintiff to cure the error by remittitur.

*Chicago, etc., R. Co. v. Brown*, 544.

**APPELLATE COURT—Transfer of cause to Supreme Court, see**

**APPEAL AND ERROR**, 16, 17; *Payne v. Terre Haute, etc., R. Co.*, 616; *Barnett v. Bryce Furnace Co.*, 572.

**APPROPRIATIONS—By county council, see COUNTIES**, 1, 2, 3, 4;

*State ex rel. v. Wayne County Council*, 356.

**ARSON—**

*Evidence.—Sufficiency.—Corpus Delicti.*—In a prosecution for attempted arson the evidence showed that an empty cigar box with a hole in the top, smoke and grease marked, as if it had served to hold a burning candle, was found lying on the ground under the edge of a frame house. There were no smoke or heat marks on the house, nor other unusual combustible material present. There was evidence that a cigar dealer gave accused a cigar box similar to the one found, but it was not established whether it was before



**ARSON—Continued.**

or after the box was found under the house. The accused was on unfriendly terms with the son of the owner and occupant of the house, but it was not shown that he knew that the son lived in the house with his father, or that he had a father living. *Held*, that the evidence was not sufficient to support a conviction.

*Chapman v. State*, 300.

**ASSIGNMENT FOR BENEFIT OF CREDITORS**—Enforcement of mortgage as against rights of creditors under assignment, see MORTGAGES 1-4; *Reagan v. First Nat. Bank*, 623.

**BAILMENT**—Appropriation of money by bailee, see EMBEZZLEMENT; *Wynegar v. State*, 577.

**BANKS AND BANKING**—Action by receiver against directors of bank for damages resulting from negligence, see RECEIVERS, 2, 3, and PLEADING, 3; *Coddington v. Canaday*, 243.

1. *Power of Banks to Borrow Money.—Insolvency.*—A bank may borrow money in the prosecution of its business, and secure the payment thereof by collaterals or otherwise, and the fact that such bank is insolvent at the time does not deprive the bank of the right to negotiate the loan and secure the payment thereof, unless it is forbidden by statute. *Harris v. Randolph County Bank*, 120.

2. *Authority of Bank President to Assign Note.—Pleading.*—Where a note is assigned on behalf of a bank by its president, and, in an action thereon it is desired to present an issue in regard to the authority of the bank president to make the assignment, it must be done by verified plea, as provided by §367 Burns 1894.

*Harris v. Randolph County Bank*, 120.

3. *Authority of Bank President to Assign Note.—Presumption.*—Where a note is assigned by a bank president as collateral security for a debt due another bank, such assignment will be presumed to be binding on the bank until it is shown that the same was not authorized or ratified by its directors.

*Harris v. Randolph County Bank*, 120.

4. *Liability of Directors for Losses Occurring Through Their Negligence.*—Under the statutes of this State (§2921 *et seq.* Burns 1901), the directors of a bank are the agents of the corporation, having the general custody, control, and management of its property and affairs, and, while not responsible for mere errors of judgment, they are responsible for losses and waste of money and property occurring through their gross inattention to the business of the bank or a wilful violation of duty.

*Coddington v. Canaday*, 243.

5. *Capital Stock.—Payment.*—An answer in an action by the receiver of an insolvent bank against the directors for damages resulting from mismanagement and accepting worthless notes, judgments, and real estate in payment of capital stock, alleging that the acceptance of such notes, judgments and real estate was expressly authorized by the stockholders, presents no defense as against the claims of creditors.

*Coddington v. Canaday*, 243.

**BILL OF EXCEPTIONS**—See APPEAL AND ERROR.

**BILLS AND NOTES**—Assignment of note by bank president, see **BANKS and BANKING** 2, 3; *Harris v. Randolph County Bank*, 120.

*Assignment of Note as Collateral Security.—Insolvency.—Preferences.*—Where a loan is made upon agreement that the debtor is to assign certain notes as collateral security, an assignment of the notes in pursuance of such agreement, but after the debtor became insolvent, is not void, as being in violation of §2934 Burns 1894, which provides against the preference of one creditor to another. *Harris v. Randolph County Bank*, 120.

**BLACKMAILING**—

1. *Indictment.*—An indictment for conspiracy to blackmail which fails to allege the ownership of the property, or explain the absence of such averment, is insufficient. *Green v. State*, 101.
2. *Gist of the Offense.*—The gist of the felony defined as blackmailing is the extortion of money, chattels, or valuable securities from a person by threatening to expose his crimes or immoralities. *Green v. State*, 101.

**BRIBERY**—Selling vote, see **ELECTIONS** 1-3; *Baum v. State*, 282.

Evidence of conversation between defendant and third person in devising the plan admissible as part of *res gestae*, see **CRIMINAL LAW** 18; *Banks v. State*, 190.

1. *Attempt to Bribe Election Judge.—Information.*—In a prosecution for attempting to bribe one who had previously been designated as an election judge of a certain precinct, an information is defective which fails to state by whom the alleged election judge had been designated for appointment, or by what authority such designation had been made. *Banks v. State*, 190.
2. *Indictment.—Criminal Law.*—An indictment against a member of the common council under §2097 Burns 1894 for soliciting pay for granting a franchise to a company to operate a switch across certain streets and alleys of the city which charges the offense in the language of the statute is sufficient, and it is not necessary to charge therein that the defendant intended to vote for the ordinance because of the money solicited. *Higgins v. State*, 57.
3. *Evidence.—Former Offenses.*—In a prosecution of a member of a common council for soliciting a bribe from one interested in the passage of an ordinance granting a franchise to a company to operate a switch across certain streets and alleys of the city, evidence that defendant solicited a bribe with reference to another ordinance pending before the common council was admissible for the purpose of showing intent or motive. *Higgins v. State*, 57.
4. *Evidence.—Intent.—Former Offenses.*—The fact that the language alleged to have been used by a member of a city council in soliciting a bribe, in a prosecution for bribery, was not equivocal, and that the jury had the right to infer therefrom the intent charged, does not render other proof of such intent or motive incompetent. *Higgins v. State*, 57.
5. *Evidence.—Intent.*—In a prosecution for soliciting a bribe evidence to the effect that defendant had on a previous occasion solicited a bribe was properly admitted for the purpose of showing defendant's motive, although defendant stated in objecting to the proposed evidence that he did not attempt to avoid criminal responsibility by relying upon the lack of intent, as such statement did not relieve the State from the burden of proving the criminal intent of the language used by defendant in the alleged solicitation. *Higgins v. State*, 57.



**BRIDGES**—Construction by road supervisor under direction of township trustee, see **TOWNSHIP TRUSTEE**; *State ex rel. v. Clifton*, 581.

Removal for purpose of dredging streams, see **MANDAMUS**, 2; *State, ex rel. v. Board, etc.*, 96.

**BRIEF**—Failure of appellee to file brief, see **APPEAL AND ERROR** 37; *Berkshire v. Caley*, 1; *Neu v. Town of Bourbon*, 476.

**CARRIERS**—See **DAMAGES**; **MASTER AND SERVANT**; **NEGLIGENCE**; **RAILROADS**; **STREET RAILROADS**.

1. *Injury to Passenger Riding on Pass.—Release.*—An action cannot be sustained by a passenger for injuries caused by the negligence of the carrier where the passenger was at the time of receiving the injury riding on a free pass which contained a stipulation releasing the carrier from such liability.

*Payne v. Terre Haute, etc., R. Co.*, 616.

2. *Contracts.—Exemption from Liability for Negligence.*—A contract entered into by a sleeping car employe releasing transportation companies "from all claims for liability of any nature or character whatsoever on account of any personal injury or death" includes injuries resulting from the negligence of a transportation company.

*Russell v. Pittsburgh, etc., R. Co.*, 305.

3. *Contracts.—Release from Liability for Injuries to Sleeping Car Employes.*—A contract entered into between a sleeping car company and a porter in charge of one of its cars releasing transportation companies over whose lines the coaches of the sleeping car company were being run from all claims for liability of any nature or character on account of any personal injury or death while traveling over such lines in said employment and service, is valid, and inures to the benefit of a railway company transporting the coach in which the porter was injured.

*Russell v. Pittsburgh, etc., R. Co.*, 305.

4. *Freight Train.—Passenger.—Railroads.*—In an action for personal injury resulting in death, the evidence showed that defendant was operating a short line of railroad to a stone quarry; that decedent boarded a coach attached to a train of cars loaded with stone, without direction or invitation, and after riding a short distance the conductor requested him to get on the car behind the engine, as he desired to leave the coach on the side-track. No fare was demanded, and there was no evidence that decedent presented himself as a passenger or that defendant ever accepted passengers on such train. *Held*, that decedent was not a passenger.

*Menaugh v. Bedford Belt R. Co.*, 20.

**CASES**—For table of cases cited, see page vi.

**CASES OVERRULED**—*Reese v. Western Union Tel. Co.*, 123 Ind. 294, see *Western Union Tel. Co. v. Ferguson*, 64.

*Sullivan v. O'Connor*, 77 Ind. 149, and *Crow v. Brunson*, 1 Ind. App. 268, see *City of Indianapolis v. Tansel*, 463.

*Western Union Tel. Co. v. Steele*, 108 Ind. 163, *Western Union Tel. Co. v. Swain*, 109 Ind. 405, and *Western Union Tel. Co. v. Jones*, 116 Ind. 861, see *Western Union Tel. Co. v. Ferguson*, 37.

**CHATTEL MORTGAGES**—See MORTGAGES.

1. *Failure to Record.—Fraud.*—A chattel mortgage will not be held fraudulent as to creditors because it was withheld from record for four months, the mortgagor reexecuting it at substantially ten-day periods, the last mortgage being placed on record, where the mortgages were omitted from record because of the promise of the mortgagor to pay the same and repeated in each period of ten days, and there was no agreement between the parties to withhold same from record. *National State Bank v. Sandford Fork, etc., Co.*, 10.
2. *To Secure Preëxisting Debt.—When Valid.*—A mortgage executed by a fraudulent purchaser of goods, to secure antecedent creditors, will be held valid as to such creditors who, in consideration of the mortgage, and without notice of fraud, have extended the time of their debt, or assumed any new or additional obligation. *Adam, etc., Co. v. Stewart*, 678.
3. *To Secure Preëxisting Debt.—Fraud.*—A mortgage made to secure an antecedent debt will not be sustained against a vendor who has been induced to part with the mortgaged property by the fraud of the mortgagor. *Adam, etc., Co. v. Stewart*, 678.

**CITIES**—See MUNICIPAL CORPORATIONS.

**CLAIMS**—Allowance by county commissioners is but *prima facie* evidence of the correctness of the claim, see COUNTIES, 5; *Sudbury v. Board, etc.*, 446.

**COLLATERAL ATTACK**—Of city ordinance, see HABEAS CORPUS, 2; *Koepke v. Hill*, 172.

**COMPLAINT**—See PLEADING.

**CONSPIRACY**—Instruction as to proof of conspiracy, see CRIMINAL LAW, 17; *Musser v. State*, 423.

Instruction as to formation, see CRIMINAL LAW, 43; *Musser v. State*, 423.

Declarations of co-conspirator who had been acquitted, see CRIMINAL LAW, 18; *Musser v. State*, 423.

To commit blackmail, see CRIMINAL LAW, 3; *Green v. State*, 101.

**CONSTITUTIONAL LAW**—Constitutionality of truancy act of 1899, see SCHOOLS, 1, 2; *State v. Bailey*, 324.

Constitutionality of pure food law of 1899, see FOOD, 9; *Isenhour v. State*, 517.

Act fixing penalty of disfranchisement for vote selling is constitutional, see ELECTIONS, 3; *Baum v. State*, 282.

Of statute providing penalty for failure to transmit telegraph message, see TELEGRAPH COMPANIES, 5, 6, 7; *Western Union Tel. Co. v. Ferguson*, 37.

Act of 1899 as to pleading and proof of contributory negligence in actions for personal injuries, see NEGLIGENCE, 1; *Indianapolis St. R. Co. v. Robinson*, 232, 414.

**CONSTITUTIONAL LAW—Continued.**

Employers liability act, see MASTER AND SERVANT, 2; *Indianapolis Union R. Co. v. Houlihan*, 494.

Barrett street improvement law, see MUNICIPAL CORPORATIONS, 1; *Martin v. Wills*, 153.

Title of act, see COUNTIES, 10; *Garrigus v. Board, etc.*, 103.

Right of appeal, see APPEAL AND ERROR, 6, 7; *Lake Erie, etc., R. Co. v. Watkins*, 600.

1. *Self-Incrimination*.—The fifth amendment of the Constitution of the United States, providing that "no person in any criminal case shall be compelled to testify against himself," has no application to the states. *State v. Comer*, 611.
2. *Delegation of Legislative Authority*.—The provision of the pure food law of 1899, that the State Board of Health shall adopt such measures as may be necessary to facilitate the enforcement of the law is not a delegation of legislative authority. *Isenhour v. State*, 517.
3. *Delegation of Legislative Authority*.—The provision of the pure food law of 1899 (Acts 1899, p. 189), that within ninety days after the passage of the act the board of health shall adopt measures necessary to facilitate the law's enforcement, and prepare rules regulating minimum standards of foods, defining specific adulterations, etc., does not render the law violative of §25, article 1, of the Constitution, which provides that "no law shall be passed, the taking effect of which shall be made to depend upon any authority except as provided in the Constitution." *Isenhour v. State*, 517.

**CONTINUANCE—**

*Absence of Witness—Affidavit*.—An application for a continuance on account of the absence of a witness is properly denied where it is not made to appear by the facts alleged in the affidavit in support thereof that there was any probability of obtaining the testimony of such witness within a reasonable time.

*Dunnington v. Syfers*, 458.

**CONTRACTS**—Inuring to benefit of third person, see CARRIERS, 3; *Russell v. Pittsburgh, etc., R. Co.*, 305.

Contract by sleeping car employe releasing transportation company from liability, see CARRIERS, 2, 3; *Russell v. Pittsburgh, etc. R. Co.*, 305.

Letters written in negotiations merged in contract, see EVIDENCE, 1; *Ralya v. Atkins & Co.*, 331.

Employment by county of expert accountants, see COUNTIES, 6-11; *Garrigus v. Board, etc.*, 103.

To keep street improvement in repair, see MUNICIPAL CORPORATIONS, 3; *Shank v. Smith*, 401.

Parol evidence not admissible to vary terms of, see EVIDENCE, 2; *Indianapolis Union R. Co. v. Houlihan*, 494.

1. *Construction by Parties—Patents—Royalties*.—Where a complaint in an action to recover royalty for an improvement sets out a written contract clear and unambiguous in its terms

**CONTRACTS—Continued.**

describing the patent by name and number, it was not error to strike out an allegation seeking to embrace therein a second patent, which was not issued until about a year after the contract was entered into, on the theory that by a common understanding and mutual consent the contract was construed and acted upon as embracing subsequent improvements, there being no averment of mutual mistake, nor reformation of the contract sought.

*Ralya v. Atkins & Co.*, 331.

2. *Rescission*.—When a party, even without right, claims to rescind a contract, if the other party agrees to the rescission, or does not object thereto, and permits it to be rescinded, the rescission is by mutual consent.

*Ralya v. Atkins & Co.*, 331.

8. *Street Railroads*.—Plaintiff entered into a written contract with a street railroad company by the terms of which the railroad company was to extend its lines to plaintiff's driving park, plaintiff to pay for the steel rails, for which he was to be repaid from the receipts of the company, except \$500, which was to be donated by him, the railroad company to lay the track and operate it, and have it ready for operation at a certain date. No definite time during which the company should operate the road was fixed by the contract. The road was constructed and operated for four years in accordance with the terms of the contract, when the company ceased operation and removed the tracks. Plaintiff brought suit, alleging in one paragraph that it was the intention of the parties that the road should be operated permanently and perpetually, and in another paragraph that it was the intention that it should be operated a reasonable time, and that a reasonable time would be twenty-five years. *Held*, that construing the contract in the light of the position and surroundings of the parties, no breach thereof was shown by the complaint, since the contract cannot be enlarged, extended or contradicted by allegations concerning the intention or understanding of the parties.

*Barney v. Indiana R. Co.*, 228.

**CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE.****CORPORATIONS—See BANKS AND BANKING; MUNICIPAL CORPORATIONS.**

Appointment of receiver when stockholders unable to agree upon officers, see **RECEIVERS** 1; *Sheridan Brick Works v. Marion Trust Co.*, 292.

1. *Preferred Stock—Mortgages*.—Under the provisions of §5064 *et seq.* Burns 1901, that in case of insolvency or dissolution of certain corporations the debts of such corporations shall be paid in preference to preferred stock therein, a mortgage executed by an insolvent corporation securing holders of preferred stock over general creditors is void as to such stockholders.

*Reagan v. First Nat. Bank*, 623.

2. *Mortgages—Preferred Stock—Fraud*.—Where an insolvent corporation, by mortgage, preferred holders of preferred stock over general creditors in violation of statute, the fact that the officers of the corporation honestly believed that it had the right to secure such stockholders will not overcome the presumption that such officers intended the fraud which resulted. *Reagan v. First Nat. Bank*, 623.

**CORPORATIONS—Continued.**

3. *Insolvency.—Mortgage Securing Holders of Preferred Stock in Violation of Statute.*—An insolvent corporation executed a mortgage to a trustee for the benefit of certain creditors, and included therein the holders of preferred stock in violation of the provision of §5064 *et seq.* Burns 1901, that general creditors shall be paid in preference to such preferred stock. The mortgage contained a provision that all of the mortgagees were to share *pro rata* without priority, except one of the creditors thereby secured, whose claim was to be second and junior to those of the other mortgagees. The mortgagees accepted the mortgage and sought to avail themselves of its benefits as against the trustee for general creditors. *Held*, that one of the beneficiaries cannot assail or repudiate any of the claims of his co-beneficiaries, and that the contract is inseparable and invalid in its entirety as against the trustee for general creditors.

*Reagan v. First Nat. Bank, 623.*

4. *Mortgages.—Execution by President.*—Under §5054 Burns 1894 the board of directors of a corporation may authorize the president of such corporation to execute a mortgage at a regular meeting of the board of directors, or by their separate assent, or by any other mode of doing such acts by individuals.

*National State Bank v. Sandford Fork, etc., Co., 10.*

5. *Mortgages.—Execution by President.*—Where the directors of a corporation specifically instructed the president to manage the finances and prudential affairs of the company according to his best judgment, and to execute any contract or instrument deemed by him necessary or prudent in the conduct of the company's affairs, and thereafter acquiesced in all the things performed by him under such instruction, such action was as effectual in authorizing the president to execute a mortgage as the formal adoption and entry upon the minutes of the corporation of a resolution to that effect. *National State Bank v. Sandford Fork, etc., Co., 10.*

6. *Appointment of Receiver.*—The rule requiring members of a corporation to seek redress from the officers of the corporation for any wrong done them as shareholders before applying to a court of equity for relief does not apply where there is no directory or governing body to which an application for redress could be made.

*Sheridan Brick Works v. Marion Trust Co., 292.*

**CORPUS DELICTI**—In prosecution for arson, see **ARSON**, *Chapman v. State, 300.*

**COUNTERCLAIM**—See **PLEADING**.

**COUNTIES—**

1. *County Council.—Appropriations.—Mandamus.*—Where the amount of a claim is not fixed by law or ascertained by judgment, the county council may in its discretion refuse to make an appropriation for its payment, and the exercise of such discretion cannot be controlled by the courts by their writ of mandamus.

*State, ex rel., v. Wayne County Council, 356.*

2. *County Council.—Appropriations.—Special Session.*—Only in a case of emergency arising after the close of the regular annual meeting of the county council can further appropriations be made at a special meeting of the council.

*State, ex rel., v. Wayne County Council, 356.*

**COUNTIES—Continued.**

3. *County Council.—Appropriations.—Special Session.*—The failure of the county council at a regular meeting to make an additional appropriation to cover a claim filed by a township assessor for services rendered does not show an emergency within the meaning of §5594a1 Burns 1901 to justify a special session for the purpose of making the additional allowance.  
*State, ex rel., v. Wayne County Council, 356.*
4. *County Council.—Failure to Make Appropriation.*—The failure or refusal of the county council to make an appropriation to pay a claim against the county does not affect the validity of the claim.  
*State, ex rel., v. Wayne County Council, 356.*
5. *Claims. — Allowance by Commissioners.* — In respect to claims against a county, the board of county commissioners acts in an administrative capacity, with power only to state the amount of legal claims chargeable against the county, and the finding of the board is but *prima facie* evidence of the correctness of the claim.  
*Sudbury v. Board, etc., 446.*
6. *Records. — Employment of Expert Accountants. — Order. — Public Necessity.*—An order of the board of county commissioners employing expert accountants to examine the county records and collect such sums of money as might be found due the county, which states that in the judgment of the board an indispensable public necessity exists for the employment of such experts, is sufficient, under §7858 Burns 1894, without stating the facts constituting the necessity.  
*Garrigus v. Board, etc., 103.*
7. *Expert Accountants.—Recovery of Claims Due County.—Compensation.*—A county cannot evade liability to expert accountants in discovering and collecting claims due the county on the ground that they recovered more than it was entitled to receive, where the county accepted and retained the amount recovered.  
*Garrigus v. Board, etc., 103.*
8. *Employment of Expert Accountants to Examine Records.*—The employment of expert accountants to examine the county records for the purpose of discovering and collecting claims due the county is not a delegation of the official powers and duties belonging to the board, where it is shown that the work could be accomplished only by long, laborious, and careful search by experts.  
*Garrigus v. Board, etc., 103.*
9. *Contracts.—Employment of Expert Accountants to Examine Records.*—The board of county commissioners has both statutory and inherent power to enter into contracts for the employment of persons to discover and collect money and property due the county which are wrongfully withheld from it, or which have been lost or misapplied through mistake, negligence, or fraud.  
*Garrigus v. Board, etc., 103.*
10. *Statutes.—Constitutional Law.*—Section 89 of the act of 1879 (§7853 Burns 1894), relative to extra allowances by the board of county commissioners is not unconstitutional in that its subject is not embraced in the title of the act. *Garrigus v. Board, etc., 103.*
11. *Statutes.—Repeal.*—Section 7853 Burns 1894, forbidding the allowance of claims for services to be paid by commission or percentage, is not repealed by the act of 1891 fixing the compensation and prescribing the duties of certain State and county officers (Acts 1891, pp. 424-452).  
*Garrigus v. Board, etc., 103.*



**COUNTIES—Continued.**

12. *Right to Office not Contractual.*—The right to public office is not contractual, and the rule of law that after a statute has been construed the construction becomes, as to contract rights, a part of the statute, is not applicable. *Sudbury v. Board, etc., 446.*
13. *Allowing Claim to County Treasurer.—Entry of Public Necessity.*—In an action to recover from an ex-county treasurer an excess of salary, where an answer alleged that the county commissioners had entered an order declaring that public necessity required the services of a treasurer, and thereafter all allowances should be made as a matter of indispensable necessity, but it was also alleged in the answer that the excessive payments were made under a statute which the commissioners thought to be in force, the payment was under the statute, and the public necessity order was no justification for the excessive payments, the reliance on the statute negating the idea of public necessity. *Sudbury v. Board, etc., 446.*
14. *Recovery of Fees and Salary Improperly Allowed County Treasurer.*—County commissioners, in view of the decision of the Supreme Court holding the fee and salary act of 1891 unconstitutional as to county treasurers, made allowances to the treasurer in accordance with the prior act of 1879. Three months before the close of such treasurer's term of office the Supreme Court modified its former decision and held that the act of 1891, as amended by the act of 1893, was valid as to county treasurers, and the commissioners made settlement for the last three months in accordance with the act of 1891. *Held*, that the county in an action against the treasurer could recover the excess which was paid under the act of 1879 over that which should have been paid under the act of 1891. *Sudbury v. Board, etc., 446.*
15. *Sale of Bonds.—Services of Treasurer.*—A county treasurer is required under §7837 Burns 1894 to receive and care for bonds issued by the county and deliver them to the purchaser upon the proper order of the board of commissioners, and is not entitled to extra compensation for services in the sale of such bonds in the absence of an employment. *Oren v. Board, etc., 158.*

**COUNTY RECORDER**—Fee for recording notice of mechanic's lien, see FEES AND SALARIES, 2; *State ex rel. v. Phillips, 481.*

**COUNTY TREASURER**—Salary under fee and salary act of 1891 see COUNTIES, 12-14; *Sudbury v. Board, etc., 446.*

**COURTS—**

1. *Jurisdiction. — Corporations. — Insolvency. — Receivers.* — Under §1366 Burns 1901 the circuit court has jurisdiction of an action by the receiver against the directors of an insolvent corporation for damages alleged to have been sustained by the corporation in consequence of the negligence of the directors. *Coddington v. Canaday, 243.*
2. *Rules.—Appeal and Error.—Transcript.*—Courts have the inherent power to ordain such rules as they may find necessary to a proper dispatch of business, and, when once established, they become invested with the force and effect of law. *State v. Van Cleave, 608.*

**CRIMINAL LAW**—See BLACKMAILING; BRIBERY.

Affidavit for violation of truancy law, see SCHOOLS, 4; *State v. Bailey*, 324.

Indictment for robbery, see ROBBERY, 1-3; *Craig v. State*, 574.

Adulteration of milk, see FOOD, 1-9; *Isenhour v. State*, 517.

Vote selling an infamous crime, see ELECTIONS, 2; *Baum v. State*, 282.

Carrying concealed weapons, see WEAPONS; *State v. Smith*, 241.

Abortion when necessary to save life, see ABORTION; *Diehl v. State*, 549.

Stenographer's notes of evidence taken before grand jury admissible in trial, see EVIDENCE, 8; *Higgins v. State*, 57.

Evidence in prosecution for attempted arson, see ARSON; *Chapman v. State*, 300.

Self-incrimination of witness, see CONSTITUTIONAL LAW, 1; *State v. Comer*, 611.

Refusal of trial by jury, see HABEAS CORPUS, 1; *Williams v. Hert*, 211.

1. *Indictment.—Seduction.*—An indictment for seduction stating all of the elements of the crime as defined in the statute is sufficient.  
*Hinkle v. State*, 237.
2. *Affidavit and Information.—Abortion.—Separate Counts Charging Inconsistent Means.*—Under §1813 Burns 1901, providing that felony or misdemeanor may be charged in separate counts in the indictment or information to have been committed by different means, the State may, by separate counts or paragraphs, not only in the information, but also in the affidavit on which the information rests, in a prosecution under §1996 Burns 1901, for producing an abortion resulting in the woman's death, charge the offense to have been committed by the accused by different means or in different ways.  
*Diehl v. State*, 549.
3. *Pleading.—Conspiracy to Commit a Felony.*—In pleading a conspiracy to commit a felony, the elements of the intended felony must be fully disclosed, so that the court may see that a public offense has been committed.  
*Green v. State*, 101.
4. *Plea in Bar.—Former Jeopardy.*—A defendant is not in legal jeopardy, within the meaning of the constitutional restriction, until he has been put upon trial before a court of competent jurisdiction, upon an indictment or information sufficient in form and substance to sustain a conviction.  
*Klein v. State*, 146.
5. *Plea in Abatement.—Former Jeopardy.*—The plea of former jeopardy is a plea in bar, and not pleadable as a plea in abatement.  
*Klein v. State*, 146.
6. *Plea in Abatement.—Prosecution by Information.*—A plea in abatement challenging the right of the State to prosecute by information, alleging that no public offense had been committed by defendant at the time of filing the information, and that he was not then under legal charge of having committed the offense stated in the information, does not negative that a public offense had been



**CRIMINAL LAW—Continued.**

committed previous to the time of filing the information for which the defendant might be prosecuted, and of which he was accused and not indicted, and the grand jury had been discharged for the term.  
*Klein v. State, 146.*

7. *Records. — Lost Information. — Substitution of Copy.*— Where after trial and verdict, and after motion for new trial had been filed, but before final judgment, the information upon which defendant was tried became lost, and the court ordered a copy thereof, which he certified to be correct, to be spread upon the information record, defendant was not injured by such substitution, and the court was not thereby divested of authority to pronounce final judgment.  
*Klein v. State, 146.*
8. *Plea in Bar. — Delay in Trial.*—A plea alleging the failure of the State to accord defendant a trial within three terms after his arrest, under the provisions of §1852 Burns 1894, must show that the delay was not caused by defendant's own act.  
*Klein v. State, 146.*
9. *Plea in Abatement.*—Defendant's plea to an indictment, that he was summoned before the grand jury and was compelled to testify as to facts concerning a crime with which he was charged, and that at the time he testified he was not informed and did not know that he had a legal right to refuse to testify against himself, and that the indictment was returned on defendant's own testimony, was not a good plea in abatement, since the statements that he was compelled to testify and that the indictment was returned on his own testimony were mere conclusions.  
*State v. Comer, 611.*
10. *Indictment. — Grand Jury.*—Where an indictment, regular upon its face, is returned into open court without objection, it will, in the absence of anything to the contrary upon the record, be presumed that the grand jury returning it was duly impaneled, charged and sworn.  
*Rinkard v. State, 534.*
11. *Indictment. — Grand Jury. — Appeal and Error.*—Objections to the organization of the grand jury, or to the regularity of the proceedings of the court in receiving an indictment, must be presented to the trial court by motion or plea in abatement, otherwise they will be deemed waived, and the fact that a defendant's defense was unsoundness of mind does not change the rule as to such waiver.  
*Rinkard v. State, 534.*
12. *Murder. — Joint Indictment. — Acquittal of One. — Evidence.*—In a trial for murder the record of the acquittal of one jointly indicted with defendant was properly excluded.  
*Musser v. State, 423.*
13. *Bribery. — Evidence. — Res Gestae. — Intent.*—Where the theory of defense of one charged with an attempt to bribe an election judge to sell an official ballot was that the accused made the offer in pursuance of a prearranged plan to have such judge produce the ballot, and then have him arrested, the conversation between defendant and a third party in devising such plan is admissible in evidence as a part of the *res gestae* and also for the purpose of rebutting the allegation of intent.  
*Banks v. State, 190.*
14. *Murder. — Identity of Dead Body.*—Where, in a trial for murder, the body of the deceased was not found for several weeks after her death, it was proper to permit the father and other witnesses to testify as to the identity of the body.  
*Keith v. State, 376.*

**CRIMINAL LAW—Continued.**

15. *Evidence.—Irrelevancy.*—In a trial for murder the testimony of a witness that on a certain night about a month after the alleged murder, but before the body of the murdered girl was found, he heard blows, and a woman's voice begging some one not to strike her, coupled with an offer to prove that defendant was not present at that time or place, was properly rejected. *Keith v. State, 376.*
16. *Evidence.—Threats of Third Persons.*—In the trial for the murder of a girl the court properly rejected the testimony of a witness that such witness was to marry the girl two days after the alleged murder was committed, and that on that day he was searching for her with threats to kill her if she did not marry him, where there was neither proof nor offer of proof of any overt act of the witness against the life of the girl. *Keith v. State, 376.*
17. *Murder. — Conspiracy. — Circumstantial Evidence. — Instruction.*—In a trial for murder, in which there was evidence that defendant conspired with others to commit the crime, the court properly instructed the jury that evidence in proof of the conspiracy is generally circumstantial, and that it is not necessary for the purpose of showing the existence of the conspiracy to prove that defendant and some other person or persons came together and actually agreed upon a common design or purpose, and agreed to pursue such common design and purpose in the manner agreed upon, but that it is sufficient if such common design and purpose is satisfactorily shown by circumstantial evidence. *Musser v. State, 423.*
18. *Murder.—Conspiracy.—Evidence.—Declarations of Co-conspirator.*—Where two or more persons are charged with a substantive offense, not a conspiracy, and it appears that the same was committed in pursuance of a conspiracy, the acts and declarations of one shown to have been engaged in the conspiracy to commit such substantive crime are admissible in evidence on the trial of the other defendant, notwithstanding the person whose declarations are sought to be proved had been previously acquitted. *Musser v. State, 423.*
19. *Murder.—Conspiracy.—Evidence.*—Where in a prosecution for murder there was evidence tending to show that three persons were present at the commission of the crime, evidence that one of the persons, who was jointly indicted with defendant, had in his possession, the next day after the murder, money, bills, and gold of the same denomination and kind shown to have been in the possession of the murdered woman before her death was properly admitted. *Musser v. State, 423.*
20. *Murder.—Evidence.*—In a trial for murder it was not error to admit in evidence an anonymous postal card received by the city marshal, stating that a woman living at a certain street had been robbed, where the jury were instructed that it was admitted only for the purposes of showing the information upon which the marshal acted in discovering the robbery and murder, and as tending to show the time when the same was placed in the postoffice. *Musser v. State, 423.*
21. *Murder.—Evidence.*—Where in a prosecution for murder the theory of the State was that the crimes of burglary, robbery and murder were committed, and that three persons participated therein, evidence that it was generally known that the murdered woman had money was properly admitted, where it was shown that one of the persons jointly indicted with

**CRIMINAL LAW—Continued.**

defendant, and who the evidence tended to show was present when the murder was committed, stated a few days before the murder "that his partner had just got out of jail; that he was going up the line to pull off a peach; that there was an old lady up the line who was afraid of banks, that she had lots of money and lived all alone," etc. *Musser v. State, 423.*

22. *Evidence.—Res Gestae.—Abortion.*—Where, in a prosecution for abortion, causing the death of the woman, a witness for the State testified to a part of a conversation overheard by her, between defendant and deceased, after the abortion was committed, the defendant was entitled to give the entire conversation for the purpose of rebutting and explaining the portion introduced by the State. *Diehl v. State, 549.*

23. *Larceny.*—In a prosecution for larceny the evidence showed that defendant contracted with a plumbing company to furnish and lay certain steam pipes upon the express condition that defendant should first secure the company by the execution of his promissory notes for the contract price, with surety. When the pipe arrived at the depot the company authorized defendant to haul it on his wagon to his farm and deposit it there for their use. Upon the refusal of defendant to execute the notes the company demanded the pipe, a part of which was hidden by defendant, and which he refused to surrender unless the company would pay certain expenses. *Held*, that the concealment of the property by defendant, and his refusal to return it except upon the payment of a fictitious and fraudulent claim, constituted a felonious taking and appropriation, and was larceny, under the statute. *Currier v. State, 114.*

24. *Evidence.—Stenographer's Notes of Evidence before Grand Jury.*—A stenographer who took the testimony of witnesses before the grand jury that indicted defendant for murder may testify and read her shorthand notes at the trial. *Keith v. State, 376.*

25. *New Trial.*—Insufficiency of the evidence to sustain the verdict is not a cause for a new trial in a criminal action. *Baum v. State, 282.*

26. *Appeal.—Evidence.—Murder.*—Where, in a trial for murder, much of the evidence tending to establish the most incriminating circumstances was strongly controverted, it was for the jury to decide what facts and circumstances were proved beyond a reasonable doubt, and for them too to draw the inferences deducible therefrom, and if the inference of guilt was fairly to be drawn from the circumstances of which there was evidence, the Supreme Court should accept the findings of the jury, approved by the trial court, although other inferences might be drawn from the circumstances in evidence. *Keith v. State, 376.*

27. *New Trial.—Verdict Contrary to Law.*—An assignment in a motion for a new trial in a criminal cause that the verdict was contrary to law is sufficient to require the Supreme Court to determine whether there is an absence of evidence in support of the verdict as a whole or of some fact essential to the existence of the crime charged. *Chapman v. State, 300.*

28. *Evidence.*—The jury are the exclusive judges of the facts proved, and of all inferences to be drawn therefrom in the trial of a criminal cause, and their finding will not be disturbed on appeal where there is some evidence to sustain it. *Braxton v. State, 213.*

29. *Evidence.—Weight.—Appeal and Error.*—Where, in a prosecution for murder, defendant interposed the plea of insanity, the

**CRIMINAL LAW—Continued.**

finding of the jury that defendant was of sound mind at the time offense was committed will not be disturbed on appeal on the evidence, on the ground that the testimony for the defendant on the issue of insanity was of an affirmative character, and that on behalf of the State was negative, and that for this reason the former only should be considered. *Rinkard v. State, 534.*

80. *Appeal.—Evidence.—Murder.*—The rule that the Supreme Court will not weigh the evidence applies to capital cases.

*Keith v. State, 376.*

81. *Appeal.*—Where a defendant in a criminal cause appeals to the Supreme Court from a judgment of conviction, he must show affirmatively by the record that there was error in the proceedings of the court, and that such error was prejudicial to his substantial rights. *Rinkard v. State, 534.*

82. *Appeal.—Prosecuting Attorney May Perfect Appeal.*—The prosecuting attorney is impliedly authorized to subscribe his name to appeal notices, and to prepare and sign assignments of errors, and take all necessary steps leading up to an appeal to the Supreme Court by the State in a criminal cause.

*State v. Sopher, 360.*

83. *Misconduct of Jury. — Evidence.* — A verdict convicting defendant of murder will not be disturbed on appeal because of the alleged misconduct of three jurors who concealed the fact on their *voir dire* that they had formed and expressed an opinion as to defendant's guilt, where the trial court heard affidavits and oral testimony pro and con and overruled a motion for a new trial.

*Keith v. State, 376.*

84. *Conviction for Violation of Penal Statute.—Appeal.*—One convicted for having violated a penal statute can have no questions under the statute reviewed on appeal which were not raised in his particular case.

*Isenhour v. State, 517.*

85. *Appeal.—Jury Trial.—Presumption.*—It will be conclusively presumed on appeal that the trial judge had a legal reason for refusing a jury trial to one charged with a crime, where the record does not show the grounds of refusal and no bill of exceptions is incorporated.

*Williams v. State, 94.*

86. *Bill of Exceptions.—Time of Filing.—Appeal and Error.*—When time is given beyond the term within which to file bill of exceptions in a criminal case, it must be granted before or at the time of the rendition of the judgment.

*State v. Kirk, 113.*

87. *Commitment to Reform School.—Constitutional Law.*—Where a minor appeared in open court in person and by counsel and waived arraignment and entered a plea of guilty to an indictment charging him with grand larceny, and the court withheld sentence and released him during good behavior, the subsequent action of the court in committing him to the reform school for boys upon his being brought into court was not in violation of §13 of the bill of rights as depriving the accused of the right to a public trial by jury.

*Lee v. McClelland, 84.*

88. *Commitment to Reform School.—Order-Book Entry.*—Where the accused, upon plea of guilty to an indictment charging him with grand larceny, was released during good behavior and afterward committed to the reform school for boys, the order of commitment is not void because it was not entered upon the order-book where no demand was made that it be entered.

*Lee v. McClelland, 84.*

**CRIMINAL LAW—Continued.**

39. *Commitment to Reform School.—Indictment.—Order.*—Where the record shows only one charge of larceny against accused, and that by indictment to which he entered a plea of guilty, an order of commitment to the reform school for boys, stating that he was brought before the court and committed on a plea of guilty to an indictment for grand larceny, without stating when the charge of larceny was made, sufficiently shows that he was committed on that indictment. *Lee v. McClelland, 84.*
40. *Commitment to Reform School.*—In an action by plaintiff to obtain custody of his minor son who had been committed to the reform school for boys it was not error to exclude the testimony of a witness that he was present in court when the commitment was made, and that at that time there was no charge made or filed against him or read to him, since the court had authority to order the commitment on a plea of guilty to an indictment previously made. *Lee v. McClelland, 84.*
41. *Commitment to Reform School.—Collateral Attack.*—In a proceeding to obtain the custody of plaintiff's son, who had been committed to the reform school for boys on a plea of guilty to an indictment for grand larceny, it must be shown, not only that the order was irregular, but that it was absolutely void, since the proceeding was a collateral attack on the order of commitment. *Lee v. McClelland, 84.*
42. *Trial. — Instructions as to Admissions and Confessions.*—Where, in a trial for murder, evidence was introduced as to admissions and confessions made by defendant, the court properly refused an instruction embodying the reasons given in §214 of Greenleaf on Evidence why admissions and confessions are to be received with great caution, since some confessions are entitled to little credit, and others, deliberately made, are entitled to great weight, and the court cannot properly charge as a matter of law that the confessions in evidence belong to one class or the other. *Keith v. State, 376.*
43. *Murder. — Conspiracy.—Evidence.—Instruction.*—An instruction in the trial of one charged with murder, in which there was evidence of conspiring with others to commit the crime, the court properly instructed the jury that while it is necessary, in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose, and that such common design may be regarded as proved if the jury believe from the evidence that the parties to such conspiracy were actually pursuing in concert the common design or purpose, whether acting separately or together, by common or different means, provided they all were leading to the same unlawful result. *Musser v. State, 423.*
44. *Murder. — Conspiracy. — Instruction. — Reasonable Doubt.*—Where defendant on trial for murder was indicted jointly with another, an instruction defining conspiracy, and the evidence necessary to establish the same, was not erroneous because it did not state that the facts and circumstances establishing the conspiracy must be proved beyond a reasonable doubt, the indictment not charging defendant with the offense of a conspiracy, but with the crime of murder in the first degree. *Musser v. State, 423.*
45. *Indeterminate Sentence Law.—Instructions.—Definition of Larceny.*—In defining grand larceny in an instruction to the jury the

**CRIMINAL LAW—Continued.**

court is not required, under the indeterminate sentence law, to state the penalty for such offense, since the jury has nothing to do with the penalty. *Currier v. State, 114.*

46. *Instructions.—Assuming Facts to be Proved.*—Where, in the trial of an action for assault and battery with intent to commit murder, the evidence showed without conflict that defendant first attacked and knocked the prosecuting witness down, rendering him unconscious by the blow, and that while he was lying on the ground in that condition defendant kicked him on the face and head, an instruction assuming the truth of the facts thus established will not work a reversal of the cause on appeal. *Braxton v. State, 213.*

47. *Instructions.—Harmless Error.*—The action of the court in giving and refusing to give certain instructions concerning the law applicable to assault and battery with intent to commit murder in the first and second degrees cannot be questioned by defendant on appeal, where he was acquitted of the intent to commit murder either in the first or second degree and was found guilty of assault and battery with intent to commit manslaughter. *Braxton v. State, 213.*

48. *Instructions.—Assuming Facts to be Proved.—Self-Defense.*—Where, in a prosecution for assault and battery with intent to kill, the evidence showed conclusively that defendant first attacked the prosecuting witness, and there was no evidence that the prosecuting witness was making or attempting to make any assault upon defendant, an instruction assuming the truth of such facts was not erroneous as taking from the jury defendant's right of self-defense. *Braxton v. State, 213.*

49. *Penal Statute.—Prohibitory Section.*—The fact that the prohibitory section of a penal statute does not include an act for which a penalty is imposed in a later section, does not render such later section invalid. *Isenhour v. State, 517.*

50. *Venue.—Murder.*—A verdict finding defendant guilty of murder will not be reversed because of failure of proof of venue, the indictment having been returned in a county other than the one in which the dead body was found, where the probative force of the circumstances in evidence was to the effect that defendant killed deceased in the county in which the indictment was returned and cast her body in a well, and afterward removed it to a creek in the county in which it was found. *Keith v. State, 376.*

51. *Murder.—Death Penalty.—Amendment of Statute After Verdict.—Ex Post Facto Law.—New Trial.—Modification of Judgment.*—Section 1941 Burns 1894 provided that sentences of death pronounced in counties south of a certain line should be executed at the Jeffersonville prison. The act of 1897 changed the name of the Jeffersonville prison to "Indiana Reformatory" without making any provision for executing death sentences in such counties. On January 11, 1901, defendant was convicted of murder in the first degree, the verdict assessing the death penalty. On January 28, 1901, a statute came into effect which provided that all death sentences thereafter pronounced should be executed at the Michigan City prison. The court thereafter pronounced judgment directing that the sentence be executed in accordance with the act of 1901. *Held*, that defendant's motion for a new trial did not raise the question as to whether the act of 1901 was *ex post facto*, but that such question should have been saved by motion to modify the judgment. *Keith v. State, 376.*



**CRIMINAL LAW—Continued.**

52. *Murder.—Death Penalty.—Statutes.—Common Law.*—Section 1941 Burns 1894 provided that sentences of death pronounced in counties south of a named line should be executed by the warden at the prison at Jeffersonville. By the act of 1897 (Acts 1897, p. 69), the name of the Jeffersonville prison was changed to the "Indiana Reformatory," and the officer in charge from "warden" to "superintendent." *Held*, that if the failure of the act of 1897 to prescribe when, where, how, and by whom death sentences should be executed impliedly repealed that part of §1941 Burns 1894 which named the time, place, manner and officer, the death penalty for murder as provided by the penal code would not be thereby abrogated, but would merely leave the court free to follow the common law in directing the execution of a sentence. *Keith v. State*, 376.

**DAMAGES**—See CARRIERS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS; STREET RAILROADS.

Measure of in action for injury to land by fire, see RAILROADS, 7; *Chicago, etc., R. Co. v. Brown*, 544.

Measure of in action for injury to personal property by fire, see RAILROADS, 8; *Chicago, etc., R. Co. v. Brown*, 544.

Mental anguish as an element of, see TELEGRAPH COMPANIES, 1; *Western Union Tel. Co. v. Ferguson*, 64.

1. *Action by Husband for Injury to Wife.*—In an action by a husband for personal injuries to his wife, the question for the consideration of the jury in determining the amount of damages to which plaintiff is entitled to recover is not how much the husband had realized or accumulated in the past from the services of his wife, but what were the services of the wife to the husband reasonably worth. *Indianapolis St. R. Co. v. Robinson*, 414.
2. *Action by Husband for Injury to Wife.*—Damages may be awarded the husband for the loss of companionship and society of his wife in an action for personal injury to the wife, although the complaint does not in so many words charge that in consequence of the injury he has been and will be deprived of her society, where the complaint discloses that such has been the result of the accident, and that such condition is likely to continue. *Indianapolis St. R. Co. v. Robinson*, 414.
8. *Speculative Damages.—Pleading.*—A counterclaim for damages in an action for goods sold and delivered alleging plaintiffs' failure to furnish to defendant a certain machine for the manufacture of bicycle hubs according to contract; that it was well known to all persons at the time the contract was made that the demand for bicycles was so great that it could not be supplied; that there was an unlimited supply on the market of all parts of a bicycle except the hub, but no hubs could be purchased; that claimant was prepared to manufacture hubs for five bicycles a day, and with the machine would manufacture 500 more bicycles per month than it was then doing was insufficient, where it was not shown that claimant was prepared to manufacture more bicycles than it had the capacity to make hubs for, or making preparation for such manufacture, or, if such additional parts were to be purchased, when and from what sources claimant expected to procure such other parts, and whether it had made any engagements for such supplies. *Acme Cycle Co. v. Clarke*, 271.

**DAMAGES—Continued.**

4. *Verdict.—Excessive Damages.*—A verdict will not be set aside as excessive where there is nothing to show that the jury were influenced by improper considerations, or that they misunderstood or misapplied the evidence. *Indianapolis St. R. Co. v. Robinson*, 414.

**DEDICATION**—By a railroad of its right of way for a highway, see **RAILROADS**, 2; *Cannon v. Cleveland, etc., R. Co.*, 682.

**DEMURRER**—Want of legal capacity to sue, see **PLEADING**, 9; *Coddington v. Canaday*, 243.

Overruling demurrer for misjoinder of causes of action, see **PLEADING**, 6; *Coddington v. Canaday*, 243.

**DESCENT AND DISTRIBUTION—**

*Action Between Heirs.—Complaint.*—In an action by heirs against certain other heirs to recover the value of property alleged to have been procured by defendants from decedent by fraudulent means, a complaint averring that there are no debts against the estate, but which fails to allege that there is no executor, administrator, widow or other person entitled to control or share in the claim sued on, is insufficient to withstand a demurrer.

*Jewell v. Gaylor*, 188.

**DISFRANCHISEMENT**—For selling vote, see **ELECTIONS**, 2, 3; *Baum v. State*, 282.

**DRAINS**—Parties on appeal in action to establish drain, see **APPEAL AND ERROR**, 15; *North v. Davisson*, 610.

**ELECTIONS**—Attempt to bribe election judge, see **BRIBERY**, 1; *Banks v. State*, 190.

1. *Bribery.—Indictment.*—In a prosecution for vote selling under the act of 1899 (Acts 1899, p. 381) it is not necessary that the affidavit and information state the names of the candidates, the purpose of the election, and the place where the election was to be held.

*Baum v. State*, 282.

2. *Bribery.—Criminal Law.—Disfranchisement.—Infamous Crime.—Constitutional Law.*—The offense of vote selling being understood and regarded from the earliest times as an infamous crime, the act of 1899 (Acts 1899, p. 381) defining the crime of vote selling or bribery, and affixing the penalty of disfranchisement, is within the authority expressly granted by §8 article 2 of the Constitution, although vote selling was not by statute made an infamous crime at the time of the adoption of the Constitution. *Baum v. State*, 282.

3. *Bribery.—Criminal Law.—Disfranchisement.—Reward.—Constitutional Law.*—The act of 1899 (Acts 1899, p. 381) fixing disfranchisement as a penalty for vote selling and providing a reward to any person procuring the testimony necessary to secure a conviction of any person violating the same is not unconstitutional in that it grants immunities to and protects one class of citizens, and punishes another class, each class being guilty of the same offense.

*Baum v. State*, 282.



**EMBEZZLEMENT—**

*Appropriation of Money by Bailee.—Agency.*—A person who appropriates to his own use money left in his hands, as bailee, is an agent of the bailor within the meaning of §2022 Burns 1901, which provides that every officer, agent or employe who shall, while in such employment, take any money belonging to such person in whose employment said agent may be shall be deemed guilty of embezzlement. *Wynegar v. State, 577.*

**EMPLOYER'S LIABILITY ACT—**See MASTER AND SERVANT.

**EQUITY—**Joinder of all persons who have interest in controversy, see PLEADING, 1; *Demarest v. Holdeman, 467.*

**ESTOPPEL—**

*Fraud.* — Where one with full knowledge of his rights and the facts, wilfully, by words or conduct, causes another to believe in the existence of a certain state of things, and thereby induces the other to act on that belief and expend money or assume obligations which he would not otherwise have done, the former will not be permitted, as against the latter, to show that a different state of facts existed at the time. *Shedd v. Webb, 585.*

**EVIDENCE—**Consideration on appeal in criminal cause, see CRIMINAL LAW, 26, 28, 29, 30; *Keith v. State, 376; Braxton v. State, 213; Rinkard v. State, 534.*

Sufficiency on appeal, see APPEAL AND ERROR, 52, 53, 54; *National State Bank v. Sandford Fork, etc., Co., 10; Sudbury v. Board, etc., 446; Sheridan Brick Works v. Marion Trust Co., 292.*

Exception to exclusion of testimony, see TRIAL, 5, 6; *Pittsburgh, etc., R. Co. v. Martin, 216; Dunnington v. Syfers, 458; Menaugh v. Bedford Belt R. Co., 20; Musser v. State, 423.*

Hearsay evidence of witnesses to will, see WILLS, 2; *Morell v. Morell, 179.*

Burden of proof in action to secure probate of will, see WILLS, 1; *Morell v. Morell, 179.*

In support of allegation of notice of defect by defendant, in action for personal injury, see PLEADING, 23; *City of Indianapolis v. Tansel, 463.*

As to rules of railroad company, see TRIAL, 1, 2; *Pittsburgh, etc., R. Co. v. Martin, 216.*

Where, in a prosecution for abortion, State proves part of conversation between defendant and deceased, defendant is entitled to give entire conversation, see CRIMINAL LAW, 22; *Diehl v. State, 549.*

Identification of dead body, see CRIMINAL LAW, 14; *Keith v. State 376.*

As to threats of third persons, see CRIMINAL LAW, 16; *Keith v. State, 376.*

As to confessions, see CRIMINAL LAW, 42; *Keith v. State, 376.*

**EVIDENCE—Continued.**

As to prior conversation in prosecution for bribery, see **CRIMINAL LAW**, 13; *Banks v. State*, 190.

In prosecution for attempted arson, see **ARSON**; *Chapman v. State*, 300.

Acquittal of one jointly indicted not admissible in trial of the other, see **CRIMINAL LAW**, 12; *Musser v. State*, 423.

As to former offenses, see **BRIBERY**, 3, 4, 5; *Higgins v. State*, 57.

Stenographer's notes of evidence taken before grand jury, see **CRIMINAL LAW**, 24; *Keith v. State*, 376.

1. *Contracts.—Letters Written in Negotiations.—Merger.*—Letters written in the negotiation of a contract are merged in the written contract and are not admissible in evidence in an action on the contract. *Ralya v. Atkins & Co.*, 331.
2. *Contracts.—Release.—Consideration.—Master and Servant.*—In an action against a railroad company for personal injuries, defendant pleaded and introduced in evidence a contract releasing defendant from liability in consideration of defendant's agreement to pay certain expenses of plaintiff, and of a sum of money recited as having been paid. *Held*, that the consideration stated is contractual, and that under a reply of no consideration parol evidence is not admissible to contradict or vary the consideration expressed. *Indianapolis Union R. Co. v. Houlihan*, 494.
3. *Patents.—Royalties.—Contracts.*—In an action on a contract to recover royalty on a patent specifically described by name and number, a second patent not referred to in the contract was not admissible in evidence. *Ralya v. Atkins & Co.*, 331.
4. *Hearsay.*—The rule that hearsay evidence must be excluded from the jury applies with equal force to statements made by one who has since died. *Morell v. Morell*, 179.
5. *Conversation.*—It is error to permit a witness to testify as to his mere understanding obtained from a conversation, instead of relating the conversation. *Diehl v. State*, 549.
6. *Handwriting.—Opinion.—Wills.*—Where the genuineness of signatures of the testator and of deceased witnesses to a will is in issue, a witness who was a near relative of testator, and a neighbor of the two subscribing witnesses, had seen them write, had received letters from the testator, and was acquainted with the handwriting of each, is shown to have sufficient qualifications to entitle him to an opinion as to the genuineness of the signatures of all. *Morell v. Morell*, 179.
7. *Opinion of Witness.—Railroads.—Fires.*—An objection to the opinion of a witness as to the value of land after the fire, in an action against a railroad company for damages caused by fire escaping from its right of way, on the ground that he had been upon only a small portion of the land after the fire, was properly overruled, where the witness was well acquainted with the nature and value of the land, and had given, without objection, his opinion of the value before the fire, since the objection went rather to the weight than to the competency of the testimony. *Chicago, etc., R. Co., v. Brown*, 544.
8. *Criminal Law.—Testimony of Defendant Before Grand Jury.—Shorthand Copy.*—A shorthand report of the testimony of de-

**EVIDENCE—Continued.**

fendant as a witness before the grand jury was properly admitted in evidence at the trial for the purpose of impeaching defendant, where the stenographer who took down the evidence testified, before reading the same, that it was a true and complete report thereof, although he testified that he had no recollection of defendant's testimony independent of the shorthand copy thereof.

*Higgins v. State, 57.*

9. *Habeas Corpus.—Parent and Child.—Guardian and Ward.*—In a *habeas corpus* proceeding by a father for the possession of his child, the court properly refused to permit plaintiff to attack the character of the daughter of the woman in whose care the guardian intended to place the child. *Berkshire v. Caley, 1.*
10. *Habeas Corpus.—Parent and Child.—Guardian and Ward.*—In a *habeas corpus* proceeding by a father to obtain the custody of his child, it was proper for the court to hear evidence in respect to the fitness and character of the woman in whose care the guardian expected to place the child. *Berkshire v. Caley, 1.*

**EXCESSIVE DAMAGES**—When verdict will not be set aside because of. see DAMAGES, 4; *Indianapolis St. R. Co. v. Robinson, 414.*

**EXPERT WITNESS**—Knowledge on which opinion is based, see OPINION EVIDENCE; *Isenhour v. State, 517.*

**EX POST FACTO LAW**—Amendment of statute after verdict as to execution of death sentence, see CRIMINAL LAW, 51, 52; *Keith v. State, 376.*

**FEES AND SALARIES**—Fees of jurors; see JURY, 1, 2; *Monroe v. State, ex rel., 45.*

Recovery of illegal allowances made to county treasurer, see COUNTIES, 13, 14; *Sudbury v. Board, etc., 446.*

1. *Act of 1891.—Salary of County Treasurer.—Publication and Distribution of Acts.*—The fee and salary act of 1891 (Acts 1891, p. 424), provided that where a county officer had been elected before "the taking effect" of the act he should not be subject to the provisions thereof. As to county treasurers, this act was unconstitutional until amended by the act of 1893 (Acts 1893, p. 142). *Held*, in a construction of the act, that the words "taking effect" did not mean "become valid and operative" in all its parts, but referred to the taking effect upon its publication and distribution with other laws of the legislative session of 1891, and that the salary of a county treasurer elected after publication and distribution of the act of 1891, but before the amendment of 1893, was governed by the act of 1891. *Sudbury v. Board, etc., 446.*
2. *Act of 1895.—Recorder's Fees.—Notice of Mechanic's Lien.—Repeal of Statute by Implication.*—Section 7258 Burns 1894, to the extent of fixing the fee of twenty-five cents for recording notice of mechanic's lien is by implication repealed by §117 of the fee and salary act of 1895 (Acts 1895, p. 349), providing that the county recorder shall receive certain fees for recording certain designated instruments, and "for entering on entry book, indexing and recording all other instruments, ten cents per hundred words, but no charge to be less than fifty cents." *State, ex rel., v. Phillips, 481.*

**FOOD**—Pure food law of 1899 is constitutional, see **CONSTITUTIONAL LAW**, 2, 8; *Isenhour v. State*, 517.

1. *Adulteration.—Prosecution Under Act of 1899.*—An affidavit charging one with having for sale adulterated milk, in violation of §2 of the act of February 28, 1899 (Acts 1899, p. 189), need not disclose whether any property was taken from defendant, or how the evidence against him was procured, and it is therefore immaterial whether or not the act provides for the taking of property without just compensation. *Isenhour v. State*, 517.
2. *Violation of Pure Food Law.—Affidavit.*—An affidavit charging defendant with having in his possession adulterated food, need not allege that the food was adulterated by defendant. *Isenhour v. State*, 517.
3. *Violation of Pure Food Law.—Affidavit.*—An affidavit charging defendant with violating the pure food law of 1899 (Acts 1899, p. 189), and reciting that he "had in his possession, with intent to sell, one pint of milk, adulterated with a certain substance injurious to health, to wit, formaldehyde," is not bad for want of an allegation that formaldehyde is either poisonous or injurious to health. *Isenhour v. State*, 517.
4. *Adulterated Milk.—Affidavit.*—Where one is charged with having in his possession, with intent to sell, milk adulterated with a substance injurious to health, it is not necessary that the affidavit charging the offense should allege that the milk in defendant's possession violated a certain standard fixed by the State Board of Health. *Isenhour v. State*, 517.
5. *Adulterated Milk.—Affidavit.*—An affidavit charging one with having for sale adulterated milk, need not set out the proviso of §1 of the pure food law, that the law shall not apply to mixtures or compounds recognized as articles of food, and not injurious to health. *Isenhour v. State*, 517.
6. *Adulteration of Milk.—Evidence.*—Defendant was charged with having in his possession, with intent to sell, milk adulterated with formaldehyde. He testified that he had used no formaldehyde, and that the milk contained none, to his knowledge, but that at the time in question he had put into the milk a substance known as "Palmer's Preserver," and that the maker of the substance had told him that it contained no formaldehyde. Defendant was then asked what representations had been made to him as to the substance used, but was not permitted to answer, and a circular was offered in evidence and excluded, which accompanied the preservative and which stated that it was harmless and guaranteed to contain no acid or injurious ingredient. *Held*, that the exclusion of the evidence was reversible error. *Isenhour v. State*, 517.
7. *Adulteration of Milk.—Evidence.—Directing Verdict.*—Where, in a prosecution of one charged with "knowingly" having adulterated milk in his possession, with intent to sell the same, the evidence showed that in the middle of the forenoon in the hot season of the year, defendant had the adulterated milk in his exclusive possession, with intent to sell and deliver it to a customer, it was proper to refuse to instruct the jury to return a verdict for defendant on the ground that it had not been proved that defendant had knowledge of the adulteration. *Isenhour v. State*, 517.
8. *Enforcement of Pure Food Law by Others Than Board of Health.*—The provision of §2 of the pure food law of 1899, that it shall be the duty of the State Board of Health to enforce the provis-

**FOOD—Continued.**

ions of such law, does not exclude individuals from making complaint against one for violation of the statute.

*Isenhour v. State*, 517.

9. *Constitutionality of Pure Food Law of 1899.—Title of Act.*—The following title of the pure food act of 1899: "An act forbidding the manufacture and sale, or offer for sale, any adulterated foods or drugs, defining foods and drugs, stating wherein the adulterations of foods and drugs consist, and defining the duties of the State Board of Health," etc., is not in violation of the constitutional requirement that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title."

*Isenhour v. State*, 517.

**FRAUD**—Estoppel by reason of, see **ESTOPPEL**; *Shedd v. Webb*, 585.

Replevin of goods when sale induced by fraud, see **REPLEVIN**; *Adam, etc., Co. v. Stewart*, 678.

Withholding mortgage from record, see **CHATTEL MORTGAGES** 1; *National State Bank v. Sandford Fork, etc., Co.*, 10.

**GAS**—Injunction to prevent enforcement of ordinance fixing gas rates, see **INJUNCTION**, 2; *City of Noblesville v. Noblesville Gas, etc., Co.*, 162.

Fixing rates to consumers, see **MUNICIPAL CORPORATIONS**, 17-20; *City of Noblesville v. Noblesville Gas, etc., Co.*, 162.

*Refusal of Company to Furnish Gas.—Franchises.*—A natural gas company authorized by the legislature to exercise the right of eminent domain, and licensed by a city to lay pipe-lines through its streets and alleys for the distribution of gas to consumers is not relieved from furnishing gas to an applicant in front of whose premises the pipes were laid, because it has an insufficient supply of gas properly to supply its present customers.

*State, ex rel., v. Consumers Gas Co.*, 345.

**GRAND JURY—**

*Examining Witnesses.*—The grand jury examining a witness under oath need not inform such witness of his constitutional privilege to refuse to testify in matters tending to criminate himself.

*State v. Comer*, 611.

**GUARDIAN AND WARD**—Custody of child, see **PARENT AND CHILD**; *Berkshire v. Caley*, 1.

**HABEAS CORPUS**—By parent to procure possession of child, see **PARENT AND CHILD**, and **EVIDENCE**, 9; *Berkshire v. Caley*, 1.

1. *Refusal of Trial by Jury.—Criminal Law.*—Where defendant was tried and convicted for petit larceny, a writ of *habeas corpus* for his release, on the ground that he was refused a trial by jury, was properly denied, as the action of the court in refusing defendant a trial by jury, if erroneous, did not deprive the court of jurisdiction of the offense charged, nor of the person of defendant, and can only be reviewed and corrected on appeal.

*Williams v. Hert*, 211.

**HABEAS CORPUS—Continued.**

2. *City Ordinance.—Constitutionality.—Collateral Attack.*—A judgment of the police court of Evansville convicting defendant for violation of a city ordinance is not void on account of the unconstitutionality of the ordinance, and the action of the circuit court in refusing to quash a writ of *habeas corpus* for the release of defendant, on the ground that the ordinance was unconstitutional, was erroneous. *Koepke v. Hill, 172.*

**HARMLESS ERROR—See APPEAL AND ERROR, 45-51.**

Misjoinder of causes of action, see PLEADING, 6; *Coddington v. Canaday, 243.*

**HEALTH—Prosecution for violation of pure food law, see FOOD, 1-9; *Isenhour v. State, 517.***

1. *Boards of Health.—Order for Vaccination of School Children.—Enforcement of Order. — Mandamus. — Parties.* — The school trustees of a city are the proper parties to be called upon to enforce an order of the board of health requiring all children to be vaccinated before being permitted to attend the schools of such city during a threatened epidemic of smallpox. *State, ex rel., v. Beil, 25.*
2. *Vaccination of School Children.—Complaint.*—A complaint by the State on the relation of the secretary of the county and city boards of health to compel the school trustees of the city schools to enforce an order of such boards of health requiring all children to be vaccinated before being permitted to attend any of the schools of the county or city respectively is not bad for failure to set out the rule adopted by the boards of health. *State, ex rel., v. Beil, 25.*
3. *Boards of Health.—Order for Vaccination of School Children.—Mandamus.*—It is the duty of the board of health to determine when there has been an exposure to contagious disease, when the health of the citizens is threatened by an epidemic, and when the preservation of the health of the people demands that the board take action to prevent the spread of such disease, and in an action to compel the school trustees of a city to enforce an order of the board of health requiring all children to be vaccinated before being permitted to attend school it is not necessary to set forth the facts constituting the emergency upon which the order was based. *State, ex rel., v. Beil, 25.*

**HUSBAND AND WIFE—Action by husband for injury to wife, see DAMAGES, 1, 2, and NEGLIGENCE, 5, 8, 9; *Indianapolis St. R. Co. v. Robinson, 414.*****INDETERMINATE SENTENCE LAW—Instruction in trial for larceny need not state the penalty for such offense, see CRIMINAL LAW, 45; *Currier v. State, 114.*****INDICTMENT—Joint indictment for murder, see CRIMINAL LAW, 12; *Musser v. State, 423.***

For seduction, see CRIMINAL LAW, 1; *Hinkle v. State, 237.*

For attempted bribery, see BRIBERY, 1, 2; *Banks v. State, 190; Higgins v. State, 57.*

For blackmailing, see BLACKMAILING, 1; *Green v. State, 101.*

**INDICTMENT—Continued.**

Objections to proceedings in returning indictment, see **CRIMINAL LAW**, 11; *Rinkard v. State*, 534.

Presumptions as to regularity, see **CRIMINAL LAW**, 10; *Rinkard v. State*, 534.

**INJUNCTION—Suit to enjoin collection of taxes, see PLEADING, 8; First Nat. Bank v. Greger, 479.**

1. *Taxation.—Complaint.*—A complaint by a bank to enjoin the collection of taxes, alleging that the valuation of its capital stock and property as entered on the tax duplicate was \$148,110, but that on appeal the State Board of Tax Commissioners assessed the same at \$188,110, and that plaintiff paid the taxes on the latter valuation, is sufficient on demurrer. *First Nat. Bank v. Greger*, 479.
2. *Natural Gas Company.—Municipal Corporations.—Complaint.*—In an action by a gas company, having the right to make reasonable charges for gas to its consumers, to enjoin the enforcement of an ordinance fixing the rate of charges, the complaint was not bad for failing to allege that the prices charged by plaintiff were reasonable. *City of Noblesville v. Noblesville Gas, etc., Co.*, 162.

**INSOLVENCY—Notice of to creditors, see NOTICE; Reagan v. First Nat. Bank, 623.**

Execution of mortgage on day of general assignment for benefit of creditors, see **MORTGAGES**, 1-4; *Reagan v. First Nat. Bank*, 623.

Mortgage by insolvent corporation securing holders of preferred stock in violation of statute, see **CORPORATIONS**, 1, 2, 8; *Reagan v. First Nat. Bank*, 623.

Insolvent bank may borrow money, see **BANKS AND BANKING**, 1; *Harris v. Randolph County Bank*, 120.

**INSTRUCTIONS—See TRIAL.****INTOXICATING LIQUORS—Ordinance prohibiting sales in residence districts, see MUNICIPAL CORPORATIONS, 21-23; Rowland v. City of Greencastle, 591.**

1. *License.—Appeal.*—Section 4 of the act of 1875 (Acts 1875, p. 55), regulating and licensing the sale of intoxicating liquors, being impressed with such ambiguity and uncertainty as to render it open to judicial construction, an appeal from a prosecution under such statute for selling intoxicating liquors without license is authorized by §8 of the act of 1901 (Acts 1901, p. 565).  
*State v. Sopher*, 360.
2. *Appeal from Order Granting License.—Right to Sell Pending Appeal.*—The act of 1875 (Acts 1875, p. 55, §5815 R. S. 1881), does not abrogate the rule that an appeal from the decision of the board of county commissioners granting a license to sell intoxicating liquors operates as a suspension of all rights of the applicant thereunder, but modifies the rule to the extent that his rights thereunder do not terminate until the close of the next term of court during which the cause may be lawfully tried.  
*State v. Sopher*, 360.



**INTOXICATING LIQUORS—Continued.**

3. *Appeal from Order Granting License.—Right to Sell Pending Appeal.*—The time within which a person licensed to sell intoxicating liquors may continue to sell under §5815 R. S. 1881, pending an appeal to the circuit court, begins with the issue of the license and terminates at the close of the term of court during which the cause may be lawfully tried. *State v. Sopher, 360.*
4. *Appeal from Order Granting License.—Right to Sell Pending Appeal.*—"Next Term of Court."—"The next term of court," as used in §5815 R. S. 1881, providing that no appeal from the order of the board of county commissioners granting a license to sell intoxicating liquors shall estop the person receiving such license from selling intoxicating liquors thereunder until the close of the next term of court, etc., means the first term of court at which complete jurisdiction, under the law, over the parties to such appeal would be acquired. *State v. Sopher, 360.*

**JEOPARDY**—Plea of former jeopardy is a plea in bar, see **CRIMINAL LAW**, 4, 5; *Klein v. State, 146.*

**JUDGMENTS—**

*Motion to Vacate.*—Where the attorney for a city elected to stand on his demurrer to a complaint in an action against the city and appeal to the Supreme Court, and allowed judgment to be entered thereon, it was not error to overrule a motion to set aside the judgment and permit the city to answer, where it was not shown that any of the city council ever inquired of their attorney about the averments of the complaint, or that the attorney was guilty of fraud or deception.

*City of Noblesville v. Noblesville Gas, etc., Co., 162.*

**JURY**—Refusal of jury trial, see **CRIMINAL LAW**, 85; *Williams v. State, 94.*

1. *Compensation.—Allowance.—Authority of Court.*—The fees of a juror are not allowed by the court. They are merely certified to be due; and if the court fixes the amount to be paid to a juror in excess of the fees and mileage to which he is lawfully entitled the act of the court is without authority, and void. *Monroe v. State, ex rel., 45.*
2. *Compensation.—No Additional Pay for Night Service.*—Section 1459 Burns 1894, fixing the fees of a juror in the circuit court at \$2 per day, has reference to a day of twenty-four hours or a portion thereof; and a juror is not entitled to additional compensation because the jury is not allowed to separate at night. *Monroe v. State, ex rel., 45.*

**JUSTICES OF THE PEACE**—Appeal of causes within jurisdiction of, see **APPEAL AND ERROR**, 1-4; *Shaul v. Citizens State Bank, 281; Lake Erie, etc., R. Co. v. Watkins, 600; Colliery Engineer Co. v. American Car, etc., Co., 111.*

**LARCENY**—Sufficiency of evidence to show crime of larceny, see **CRIMINAL LAW**, 28, *Currier v. State, 114.*

**LICENSE**—To sell intoxicating liquors, see **INTOXICATING LIQUORS**, 1-4; *State v. Sopher, 360.*



**LOST INFORMATION**—Substitution of copy, see **CRIMINAL LAW**, 7;  
*Klein v. State*, 146.

**MANDAMUS**—To enforce order for vaccination of school children,  
see **HEALTH**, 1-3; *State, ex rel., v. Beil*, 25.

To require county council to make appropriation, see **COUNTIES**, 1;  
*State, ex rel., v. Wayne County Council*, 356.

Against road supervisor binding on his successor in office, see  
**OFFICERS**, 5; *Schrader v. State, ex rel.*, 341.

1. *Removal of Policeman.—Charges.*—Where a policeman of a city was removed by a majority vote, but less than two-thirds vote of the common council, a petition thereafter for a writ of mandate to compel the mayor and council to prefer charges against him as policeman before removing him is insufficient which fails to show when relator was appointed, for what term or length of time, upon what conditions, or that any demand for a trial or other redress was made, or that he requested a reinstatement, or to have the proceedings set aside.  
*State, ex rel., v. Fisher*, 412.

2. *Dredging of Water Course.—Removal of Bridges by County Commissioners.*—Mandamus will not lie, at the suit of the drainage commissioner, against the county commissioners and township trustees to compel them, at public expense, to remove iron bridges over a water course in the county, in order that the contractor appointed by the drainage commissioner to construct the ditch may proceed with the work, though the necessary dredging machines can neither pass under nor around the bridges.  
*State, ex rel., v. Board, etc.*, 96.

3. *Pauper. — Insane Person. — Deportation from State.* — The board of directors of an infirmary of a county in the state of Ohio is not entitled to a writ of mandate to compel the sheriff and jailer of a county in this State to receive and imprison an insane pauper that such sheriff had secretly conveyed and released in the Ohio county.  
*State, ex rel., v. Overman*, 141.

4. *Pauper.— Insane Person.— Deportation from State.— Constitutional Law.*—Section 2, article 4 of the United States Constitution securing to the citizens of all the states the privileges enjoyed by the citizens of each state does not authorize the board of directors of an infirmary of a county in Ohio to compel by mandamus the sheriff of a county in this State to receive an insane pauper that such sheriff had secretly conveyed and released in the Ohio county.  
*State, ex rel., v. Overman*, 141.

## **MASTER AND SERVANT—**

1. *Railroads.—Employers' Liability Act.—Personal Injuries.—Complaint.*—In an action by a railroad employe for an injury caused by the alleged negligence of defendant's locomotive engineer, it is not necessary to allege in the complaint, under the first part of the fourth subdivision of the first section of the employers' liability act (§§7083-7087 Burns 1894), that plaintiff was "obeying or conforming to the order of some superior at the time of such injury, having authority to direct."

*Indianapolis Union R. Co. v. Houlihan*, 494.

2. *Employers' Liability Act. — Railroads. — Personal Injuries. — Constitutional Law.*—The provision of fourth subdivision of the first section of the employers' liability act (§§7083-7087 Burns 1894), which holds railroad companies liable to their employes, the

**MASTER AND SERVANT—Continued.**

same as to strangers, for the negligence of their servants in charge of signals and so forth, is not in conflict with the equality clauses of the federal and State Constitutions.

*Indianapolis Union R. Co. v. Houlihan*, 494.

3. *Personal Injuries. — Railroads. — Special Findings.* — In an action against a railroad company for personal injuries caused by the breaking of a brake-staff the special findings disclosed that the defect in the staff consisted of a flaw in the metal which was hidden from view and observation, and could not be discovered without removing the ratchet wheel; that the car had been purchased of a manufacturer of cars of good repute, had been inspected on the day previous to the accident, and that an inspection of the car and staff made in the usual manner would not disclose the defect. *Held*, that the court properly overruled a motion for judgment for plaintiff on the findings.

*Chestnut v. Southern Indiana R. Co.*, 509.

**MECHANIC'S LIEN**—Fee for recording notice of under fee and salary act of 1895, see FEES AND SALARIES, 2; *State, ex rel., v. Phillips*, 481.

**MENTAL ANGUISH**—Damages for, see TELEGRAPH COMPANIES, 1; *Western Union Tel. Co. v. Ferguson*, 64.

**MORTGAGES—See CHATTEL MORTGAGES.**

Execution by president of corporation, see CORPORATIONS, 4, 5; *National State Bank v. Sandford Fork, etc., Co.*, 10.

Holders of preferred stock included in mortgage given by corporation to secure creditors, see CORPORATIONS, 1, 2, 8; *Reagan v. First Nat. Bank*, 623.

1. *Assignment for Benefit of Creditors.—Insolvency.* — Where an insolvent corporation on the day it executed a mortgage to a trustee for the benefit of certain creditors, and before any of the beneficiaries therein named had accepted it, or had any knowledge of the fact that it had any existence, made a voluntary assignment for the benefit of creditors, such mortgage cannot be enforced as against the rights of creditors under the assignment.

*Reagan v. First National Bank*, 623.

2. *Corporations.—Insolvency.—Assignment for Benefit of Creditors.—Acceptance of Mortgage by Junior Mortgagee.* — Where an insolvent corporation included the holders of preferred stock in a mortgage to secure certain creditors, in violation of law, creditors secured by a second mortgage, which by its express terms is made subordinate and subject to the first mortgage, will not be presumed to have accepted the same, since such mortgagees would be thereby precluded from assailing the fraudulent claim of the preferred stockholders.

*Reagan v. First National Bank*, 623.

3. *Assignment for Benefit of Creditors.—Acceptance of Mortgage.* — Where mortgaged property, before acceptance on the part of the mortgagees, passed under the supervision and control of the court under an assignment for the benefit of creditors, the mortgagees cannot, by accepting the mortgage thereafter, have their acceptance relate back, and thereby make the mortgage effectual as a lien prior to the recording of the deed of assignment.

*Reagan v. First National Bank*, 623.

**MORTGAGES—Continued.**

4. *Acceptance of Mortgage by Trustee.—Corporations.—Insolvency.*—Where an insolvent corporation, in the execution of a mortgage to a trustee for the benefit of certain creditors, made the same subject to such conditions as would overthrow the presumption of acceptance on the part of the mortgagees, the acceptance by the trustee appointed by the mortgagor will not amount to an acceptance on the part of the mortgagees.

*Reagan v. First National Bank, 623.*

5. *Foreclosure.—Disputing Title of Grantor.—Estoppel.—Fraud.*—In an action to foreclose a mortgage, it appeared that defendant railway company had possession of the lands in controversy under legislative authority, and had occupied the same, except a strip six feet wide, for more than forty years, as a right of way, claiming title thereto, but having no record title. The owners of the lands traversed by the right of way conveyed the right of way to a third person, who executed back his note and mortgage for the purchase money, and afterward sold and conveyed the strip of land to the railroad company, the mortgagees withholding their mortgage from record until the sale and conveyance was completed, the mortgagor and mortgagees representing to the company that there was no lien or incumbrance thereon. *Held*, that defendant company was not estopped to dispute plaintiff's claim of title to the land described in the mortgage. *Shedd v. Webb, 585.*

**MOTIONS**—To reject pleading, see PLEADING, 11; *Tilden v. Louisville, etc., Co., 532.*

To make complaint more specific, see PLEADING, 21, 22; *Coddington v. Canaday, 243.*

To strike out, see PLEADING, 20; *Coddington v. Canaday, 243.*

To vacate judgment, see JUDGMENTS; *City of Noblesville v. Noblesville Gas, etc., Co., 162.*

**MUNICIPAL CORPORATIONS—**

1. *Street Improvements.—Constitutional Law.—Barrett Law.*—The act of 1889 known as the Barrett law and the amendments thereto, providing for the apportionment of the costs of a street improvement upon the abutting lots according to their frontage, are not in conflict with any provision of the State or United States Constitution. *Martin v. Wills, 153.*
2. *Street Improvements.—Enforcement of Assessments.—Foreclosure.—Precept.—Barrett Law.*—Street improvement assessments may be collected by the contractor by precept issued by order of the common council of the city as provided by §4298 Burns 1894 or by foreclosure of the lien and sale of the property as provided in §4294 Burns 1894. *Martin v. Wills, 153.*
3. *Street Improvements.—Contracts.—Guaranty.—Repairs.*—A contract for a street improvement under §§4288-4300 Burns 1901, conditioned that the contractor should make all repairs for a period of seven years that became necessary as a result of unskilful construction or unsuitable material, retaining a certain per cent. of the contract price as a guaranty fund for such repairs, is not invalid as assessing the cost of repairs as part of the cost of the construction of the improvement. *Shank v. Smith, 401.*

**MUNICIPAL CORPORATIONS—Continued.**

4. *Street Improvements.—Foreclosure of Lien.—Complaint.*—A complaint to foreclose a street improvement assessment, making a copy of the assessment roll relating to defendant's assessment a part thereof by exhibit, and disclosing that the municipal authorities performed or caused to be performed all the material acts required by the statute to create the lien is sufficient, without making copies of all resolutions, ordinances and orders adopted by the common council in the proceeding exhibits. *Leeds v. Defrees, 392.*
5. *Street Improvement Assessments.—Presumptions.*—It will be presumed in the absence of any opposing facts that the council in adopting the estimate of a street improvement assessment prepared by the city civil engineer considered it as a *prima facie* true and correct assessment by which the entire cost of the improvement was apportioned to each parcel of the abutting property according to the benefits derived by such property by reason of the street improvement, and such assessment must be deemed to be valid when assailed in a collateral proceeding. *Leeds v. Defrees, 392.*
6. *Street Improvements.—Assessments.—Hearing.—Waiver.—Collateral Attack.*—Abutting property owners will not be permitted to waive their right to injunction or mandamus to compel a hearing on the engineer's report for street improvement assessments until the assessments are approved, and make the denial of a hearing available as a defense to an action to enforce the collection of the assessments. *Shank v. Smith, 401.*
7. *Street Improvements.—Assessments.—Hearing.—Collateral Attack.*—The right of the common council or board of trustees to hear and consider the engineer's report of assessments for street improvements and the adjustment of the assessments to the benefits received is a *quasi* judicial power, and, where the board had jurisdiction of the person and subject-matter, their judgment, fair on its face, cannot be attacked in a collateral proceeding. *Shank v. Smith, 401.*
8. *Street Improvement Assessments.—Hearing.—Adjustment of Assessments.*—Under §4294 Burns 1894, an aggrieved property owner may appear before the common council at the time fixed for hearing the engineer's report of a street improvement assessment and present his objections thereto, and the council has plenary power to adjust the assessments in accordance with the benefits received. *Leeds v. Defrees, 392.*
9. *Street Improvements.—Notice.—Hearing.—Due Process of Law.*—Under §4294 Burns 1894, an aggrieved property owner is given notice of the proposed assessment against his property, and awarded a hearing, consequently such owner is given his day in court, and it cannot be asserted that under this statute he is deprived of his property without due process of law. *Leeds v. Defrees, 392.*
10. *Assessment for Street Improvements.—Collateral Attack.*—Where a person is summoned before a tribunal to challenge an assessment against his property for street improvements, he may not avoid the effect of non-attendance by averring in a subsequent proceeding that he was misled as to the tribunal's intended course of action. *Gorman v. State, ex rel., 205.*
11. *Assessment for Street Improvements.—Modification by Board of Public Works.—Mandamus.*—Under §3981 Burns Supp. 1897, providing the manner in which property shall be assessed for street improvements, the board of public works can not be compelled by

**MUNICIPAL CORPORATIONS—Continued.**

mandate to make a new assessment for an amount the court thinks right, after such board, in compliance with the statute, has confirmed the assessment, and delivered the assessment roll to the department of finance.  
*Gorman v. State, ex rel., 205.*

12. *Street Improvements.—Personal Judgment.—Appeal and Error.*—Where in an action to foreclose a street improvement assessment, the court rendered a personal judgment against the defendant, in addition to the decree foreclosing the lien, and no objections to the form or character of the judgment or motion to modify the same were made, the cause cannot be reversed because of such error.  
*Leeds v. Defrees, 392.*

13. *Sewers.—Foreclosure of Assessments.—Complaint.*—Section 4480 Burns 1901 provides that the appraisers appointed to assess the benefits in the construction of a sewer shall file the schedule thereof with the clerk of the board of town trustees who shall record the same, after which the assessments therein made shall become a lien on the lots specified. Section 4487 Burns 1901 provides that in an action to enforce the lien the presumption of law shall be that all provisions of the act have been complied with. *Held*, that such presumption does not render sufficient a complaint to enforce a sewer assessment lien which fails to aver that the schedule showing the benefits assessed against defendant's property was recorded in the records of the board of trustees.

*Welch v. Town of Roanoke, 398.*

14. *Sewers.—Act of 1867 not Repealed by Act of 1889.*—The act of 1867 (§§4429-4448 Burns 1901) for the construction of sewers was not repealed by the act of 1889, known as the Barrett law, but said acts provide two separate and distinct systems for the construction of sewers by incorporated towns.

*Welch v. Town of Roanoke, 398.*

15. *Ordinance Prohibiting the Use of Gates Swinging Outward.—Statutes.*—A town ordinance prohibiting the construction or use of gates that open or swing out upon the side walk is not invalid under §1709 Burns 1901, forbidding any incorporated town or city from making punishable any act declared by statute to constitute a public offense against the State on the ground that the act made penal by the ordinance is a misdemeanor, under §2043 Burns 1901, concerning the obstruction of highways, since the ordinance is preventive of the act declared by the statute to constitute a public offense.

*Town of Rosedale v. Hanner, 390.*

16. *Ordinances.—Gates Swinging Outward.*—A town ordinance prohibiting the construction or use of gates that swing outward upon the sidewalk is reasonable and clearly within the power vested in incorporated towns by clauses 6, 11, §4357 Burns 1901.

*Town of Rosedale v. Hanner, 390.*

17. *Natural Gas.—Fixing Rates for Consumers.—Franchises.*—The act of 1887 (Acts 1887, p. 86) does not confer upon municipal corporations the authority to regulate the prices charged by a natural gas company to its consumers.

*City of Noblesville v. Noblesville Gas, etc., Co., 162.*

18. *Natural Gas.—Franchises.—Rates.—Acceptance.*—Although a city has no authority under the act of 1887 (Acts 1887, p. 86) to fix the rates for natural gas to consumers, an ordinance passed by a city fixing the rates and accepted by a gas company amounts to a contract, and is binding on the company.

*City of Noblesville v. Noblesville Gas, etc., Co., 162.*

**MUNICIPAL CORPORATIONS—Continued.**

19. *Natural Gas.—Franchises.—Rates.—Acceptance.*—Where a natural gas company was operating under an ordinance which did not fix the rates to be charged consumers, and afterward accepted the terms of an ordinance adopted by the city fixing the rates, the company is bound by the latter ordinance, as the legal authorization of a schedule of rates was a sufficient consideration for the acceptance. *City of Noblesville v. Noblesville Gas, etc., Co., 162.*
20. *Natural Gas.—Franchises.—Rates.*—Where a gas company in accepting an ordinance fixing the rates to be charged consumers expressly reserved all vested rights under its franchise, one of the provisions thereof being the right to fix its own prices, within reasonable limits, for gas, such reservation will be held to apply to all uses of gas not specified in the last ordinance. *City of Noblesville v. Noblesville Gas, etc., Co., 162.*
21. *Ordinance Prohibiting Sale of Intoxicating Liquors in Residence District.*—Under subdivision 13 of §8541 Burns 1902, authorizing the common council of a city to regulate places where intoxicating liquors are sold, and to exclude such sales from the suburban or residence portion of the city, the common council may fix and declare the boundaries of the business district of a city in an ordinance excluding the sale of intoxicating liquors from the suburban or residence portion. *Rowland v. City of Greencastle, 591.*
22. *Sale of Intoxicating Liquors in Residence District in Violation of Ordinance.—Evidence.*—On the trial of an action by a city charging defendant with the violation of an ordinance prohibiting the sale of intoxicating liquors in the residence portion of such city, the ordinance is *prima facie* evidence as to what is the residence and what the business portion of the city, but other evidence may be admitted to show that the place of sale by defendant was in fact in the business portion. *Rowland v. City of Greencastle, 591.*
23. *Designating Locality in City Where Liquor May be Sold.*—Subdivision 13 of §8541 Burns 1901, providing that the common council of a city, in licensing and restraining places for the sale of intoxicating liquors, shall have the power to designate the room, building or structure where such liquors may be sold, does not empower the common council to fix conclusively the localities in which intoxicating liquors may be kept for sale to be used upon the premises. *Rowland v. City of Greencastle, 591.*
24. *Removal of City Officer by Common Council.*—The act of 1867 (§8101 R. S. 1881) authorizing the common council of any city by a two-thirds vote of its members to remove a city officer for any offense against the character or duty of his office, is not repealed by implication by the act of 1875 (§6012 R. S. 1881) which provides for the removal of public officers for drunkenness upon complaint being filed in the circuit court by any citizen, or by the act of 1897 (§§8108u-8108g1 Burns 1901), which provides for the impeachment and removal of such officers upon accusations in writing by the grand jury. *State, ex rel., v. City of Noblesville, 31.*
25. *Removal of City Officer.—Oath of Mayor and Council.*—In the removal of a city officer, under §8101 R. S. 1881, the mayor and common council of a city act under their official oaths, and need not be specially sworn. *State, ex rel., v. City of Noblesville, 31.*
26. *Ordinance.—Publication.*—An ordinance which prescribes only the manner in which charges of official misconduct shall be preferred,



**MUNICIPAL CORPORATIONS—Continued.**

the notice to be given, and the mode of hearing the evidence, is not penal, nor does it impose a forfeiture; and therefore its publication is unnecessary. *State, ex rel., v. City of Noblesville, 31.*

27. *Proof of Publication of Ordinance.—When Not Necessary.*—In an action to recover penalty for violation of a city ordinance, it is not necessary to prove publication of the ordinance where such publication was not contradicted by affidavit.

*Rowland v. City of Greencastle, 591.*

28. *Proof of Publication of Ordinance.*—The introduction in evidence of a printed copy of an ordinance, with the affidavit of the printer, his foreman or clerk, or any competent witness, stating the fact of its publication and the dates thereof, is a sufficient proof of publication. Proof of filing affidavit of publication in clerk's office is not necessary. *Rowland v. City of Greencastle, 591.*

**MURDER**—Conspiracy, see **CRIMINAL LAW**, 17-19; *Musser v. State, 423.*

Acquittal of one jointly indicted not admissible in trial of other, see **CRIMINAL LAW**, 12; *Musser v. State, 423.*

Identification of body of deceased, see **CRIMINAL LAW**, 14; *Keith v. State, 376.*

Amendment of statute after verdict as to execution of death sentence, see **CRIMINAL LAW**, 51, 52; *Keith v. State, 376.*

Consideration of evidence on appeal, see **CRIMINAL LAW**, 80; *Keith v. State, 376.*

**NATURAL GAS**—See **GAS**.

**NEGLIGENCE**—See **CARRIERS**; **DAMAGES**; **MASTER AND SERVANT**; **RAILROADS**; **STREET RAILROADS**.

Charging negligence in complaint, see **PLEADING**, 2; *Indianapolis Union R. Co. v. Houlihan, 494.*

Of directors of bank, see **BANKS AND BANKING**, 4; *Coddington v. Canaday, 243.*

A sleeping car employe may release a transportation company from liability for negligence, see **CARRIERS**, 2, 8; *Russell v. Pittsburgh, etc., R. Co., 305.*

1. *Pleading. — Contributory Negligence. — Constitutional Law. —* The act of 1899 (Acts 1899, p. 58, §359a Burns 1901) providing that in all actions for damages arising from personal injury or death it shall not be necessary for plaintiff to allege or prove freedom from contributory negligence on the part of plaintiff, or on the part of the person for whose injury or death the action is brought, is not violative of §22, article 4 of the State Constitution, prohibiting the passage of local or special laws regulating the practice in courts of justice.

*Indianapolis St. R. Co. v. Robinson, 232; Indianapolis St. R. Co. v. Robinson, 414.*

2. *Pleading. — Contributory Negligence. — Constitutional Law. — Statutes.*—The act of 1899 (Acts of 1899, p. 58, §359a Burns 1901), providing that in all actions for damages arising from personal injury or death it shall not be necessary for plaintiff to allege or prove freedom from contributory negligence on the part of plaintiff, or on the

**NEGLIGENCE—Continued.**

part of the person for whose injury or death the action is brought, is not invalid because it expressly excludes all pending cases from its operation. *Indianapolis St. R. Co. v. Robinson, 232.*

3. *Pleading.—Contributory Negligence.*—Under the act of 1899 (Acts 1899, p. 58, §359a Burns 1901), the plaintiff in an action for personal injury is required to allege and prove by a preponderance of the evidence that the defendant's negligence was the proximate cause of his injuries, and, if he has by his own conduct forfeited his right of recovery, such delinquency, when not disclosed by plaintiff, if made available to the defendant, must be established as a matter of defense by a like preponderance of the evidence.

*Southern Indiana R. Co. v. Peyton, 690.*

4. *Pleading.—Contributory Negligence.*—A complaint in an action for the death of a railroad engineer, caused by a collision with defendant's train which was being operated over a portion of the line on which decedent was employed, is not bad for failing to allege that decedent, before attempting to pass the point of junction, stopped the train and looked and listened, since if such failure to stop amounted to contributory negligence it was matter to be pleaded in defense. *Southern Indiana R. Co. v. Peyton, 690.*

5. *Medical Care.—Pleading.—Husband and Wife.*—In an action by a husband for damages for loss of services of his wife, resulting from an injury sustained by her through the alleged negligence of defendant, it is not necessary to allege that plaintiff used reasonable diligence to provide medical attention and other care for his wife, as such negligence, if it existed, was matter in defense.

*Indianapolis St. R. Co. v. Robinson, 414.*

6. *Pleading.—Contributory Negligence.—Statutes.—Application.*—The act of 1899 (Acts 1899, p. 58, §359a Burns 1901), providing that in all actions for damages arising from personal injury or death it shall not be necessary to allege or prove freedom from contributory negligence on the part of plaintiff, or on the part of the person for whose injury or death the action is brought, applies to a cause of action existing at the time of its passage, where the suit was not commenced until after the act took effect.

*Southern Indiana R. Co. v. Peyton, 690.*

7. *Pleading.—Contributory Negligence.—Presumptions.*—No adverse presumptions arise because of the failure of plaintiff to allege freedom from contributory negligence in an action for personal injuries or death. *Southern Indiana R. Co. v. Peyton, 690.*

8. *Pleading.—Trial.—Evidence.—Husband and Wife.*—Where a complaint in an action by a husband for loss of services of his wife alleged that the loss of services and the expense for care and medical attention were the result of the injury sustained by the wife as a consequence of defendant's negligence, if the effect of the injury was aggravated by the neglect of plaintiff to furnish proper care, such neglect might be proved under the general denial in mitigation of damages. *Indianapolis St. R. Co. v. Robinson, 414.*

9. *Evidence.—Medical Service.—Husband and Wife.*—Where, in an action by a husband for personal injuries sustained by his wife, the family physician testified that in his opinion a surgical operation might become necessary to relieve plaintiff's wife, it was proper to show the expense of such operation.

*Indianapolis St. R. Co. v. Robinson, 414.*



**NEGLIGENCE—Continued.**

10. *Personal Injury.—Evidence.—Street Railroads.*—In an action by a husband for personal injuries to his wife, evidence that the wife did not sleep well after the accident, and had to take medicine to produce sleep, was competent.

*Indianapolis St. R. Co. v. Robinson, 414.*

11. *Contributory Negligence. — Evidence. — Railroads.* — Decedent, as a locomotive engineer, was engaged in operating a switch engine over tracks used by several companies. No printed rules of any of the companies applied to the operation of trains upon the common tracks, but it was established by usage that all trains had equal rights; all south bound ran on the east track, all north bound on the west; each engine or train was to be run under full control, and with a sharp lookout to avoid running into any engine or train ahead of it. An ordinance forbade the running of engines at a higher speed than four miles an hour. While engaged in switching a car to a side-track, defendant's passenger train was seen approaching from the north at a distance of about 750 feet, whereupon decedent blew the whistle as a warning for defendant's train to stop, and said to the fireman "they will stop." Decedent had stopped his engine and thrown the lever to proceed south when defendant's engine, under a headway of thirty miles an hour, ran into decedent's engine, killing decedent. *Held*, that decedent was free from contributory negligence. *Pittsburgh, etc., R. Co. v. Martin, 216.*

12. *Pleading.—Contributory Negligence.*—A complaint in an action against a railroad company for the death of plaintiff's intestate is not bad as failing to show decedent's freedom from fault, where it is shown that decedent was in a place where he had a right to be, was in the line of his employment, and was killed while there in a collision with respect to which defendant was negligent; there being a general allegation of freedom from contributory negligence, it not being disclosed what decedent did, or what, having the opportunity, he failed to do.

*Pittsburgh, etc., R. Co. v. Martin, 216.*

13. *Railroads. — Directing Verdict. — Contributory Negligence.* — In an action against a railroad company for personal injury resulting in death, the evidence showed that decedent boarded a coach attached to a train of cars loaded with stone, without direction or invitation, and after riding about three-quarters of a mile the conductor requested him to get on the car immediately behind the engine, as he desired to leave the coach on the side-track, whereupon the deceased took a seat on the tool-box attached to the rear of the tender to avoid the cinders, and the engine and tender left the track, causing death of decedent. *Held*, that the decedent was guilty of contributory negligence and that the court properly instructed the jury to return a verdict for defendant.

*Menaugh v. Bedford Belt R. Co., 20.*

**NEW TRIAL**—Misconduct of jury as cause for, see TRIAL, 14; *Ellis v. City of Hammond, 267.*

Insufficiency of evidence to sustain verdict not cause for in criminal case, see CRIMINAL LAW, 25; *Baum v. State, 282.*

Assignment in motion for new trial that verdict is contrary to law, see CRIMINAL LAW, 27; *Chapman v. State, 300.*

**NEW TRIAL—Continued.**

1. *Newly Discovered Evidence.—Criminal Law.*—No error was committed in denying a motion for a new trial, on the ground of newly discovered evidence, in a prosecution for murder in which unsoundness of mind was one of the defenses, where the evidence relied upon was as to unsoundness of mind of defendant and was cumulative. *Rinkard v. State, 534.*
2. *Newly Discovered Evidence.*—A new trial will not be granted plaintiff in an action for damages for personal injuries resulting from an alleged defective street on newly discovered evidence of physicians as to the character of the injuries sustained. *Ellis v. City of Hammond, 267.*
3. *Evidence.—Surprise.—Trial.*—In order to obtain a new trial under subdivision three of §568 Burns 1901 because of surprise at the testimony of a witness, a motion for a continuance should be made, or that the submission be set aside and the cause withdrawn from the court or jury. *Ellis v. City of Hammond, 267.*
4. *Admissions Made After Trial.*—Admissions made by a party to an action by act or word after trial may be used to support a charge of misconduct made a ground for a new trial. *Sullivan v. O'Conner, 77 Ind. 149, and Crow v. Brunson, 1 Ind. App. 268, disapproved. City of Indianapolis v. Tansel, 463.*

**NOTICE**—By tax board of increase in valuation of property, see **TAXATION**, 1, 2; *Hubbard v. Goss, 485.*

*Of Insolvency.—Debtor and Creditor.*—Where a creditor of a corporation has notice of such facts or circumstances which ought to put him upon inquiry as to the insolvency of the corporation, but, instead of doing so, avoids making any inquiry, the law will impute to him notice of such facts as he could have ascertained had he exercised ordinary diligence. *Reagan v. First Nat. Bank, 623.*

**OFFICERS**—Road supervisor must carry orders of trustee into effect, see **TOWNSHIP TRUSTEE**; *State, ex rel., v. Clifton, 581.*

Removal of policeman, see **MANDAMUS**, 1; *State, ex rel., v. Fisher, 412.*

Removal of city officer, see **MUNICIPAL CORPORATIONS**, 24-26; *State, ex rel., v. City of Noblesville, 31.*

Right to office not contractual, see **COUNTIES**, 12; *Sudbury v. Board, etc., 446.*

Soliciting bribe, see **BRIBERY**, 2, 3, 4, 5; *Higgins v. State, 57.*

1. *Expiration of Term.—Appeal.—Substitution of Parties.*—Where a road supervisor appealed from a judgment after the termination of his term of office and the election and qualification of his successor, his successor cannot be substituted as appellant after the expiration of the time limit for appeal fixed by statute. *Schrader v. State, ex rel., 341.*
2. *Expiration of Office.—Mandamus.—Appeal.*—Where a peremptory writ of mandate was directed to be issued against a road supervisor requiring him to issue a road tax receipt to relator, the action was against the incumbent in his official capacity, and he could not appeal from such judgment after the expiration of his term of office. *Schrader v. State, ex rel., 341.*

**OFFICERS—Continued.**

3. *Allowance by Commissioners of Illegal Claim to Treasurer.*—The allowance by a board of county commissioners to a county treasurer of salary and fees to which he was not legally entitled, but which was allowed under a statute which the commissioners thought to be in force, was not a voluntary payment under mistake of law, but was in legal effect a withholding of the county's money by the treasurer with the connivance of the board of commissioners.  
*Sudbury v. Board, etc., 446.*
4. *Penalty.—Liability on Official Bond.*—The penalty imposed on an officer by §132 of the act of March 11, 1895, for failure to report or pay over fees collected is in the nature of a punishment of the officer, and cannot be recovered by the State in an action on an official bond conditioned that such officer shall faithfully discharge his duties and pay over all moneys coming into his hands as such officer.  
*State v. Flynn, 52.*
5. *Road Supervisor.—Mandamus.*—A writ of mandate issued against a road supervisor requiring him to issue a road receipt is binding on his successor in office.  
*Schrader v. State, ex rel., 341.*

**OPINION EVIDENCE**—As to handwriting, see EVIDENCE, 6;  
*Morell v. Morell, 179.*

As to value of land, see EVIDENCE, 7; *Chicago, etc., R. Co. v. Brown, 544.*

*Physician as an Expert Witness.*—Where a physician exhibits such a degree of knowledge as to make it appear that his opinion is of some value, he is entitled to testify, though his knowledge is gained from reading, study and conversations with other physicians, and not from his own experiments.  
*Isenhour v. State, 517.*

**ORDINANCES**—Publication, see MUNICIPAL CORPORATIONS, 26;  
*State, ex rel., v. City of Noblesville, 31.*

Proof of publication, see MUNICIPAL CORPORATIONS, 27, 28; *Rowland v. City of Greencastle, 591.*

**OVERRULED CASES**—See CASES OVERRULED.

Subject covered by statute, see MUNICIPAL CORPORATIONS, 15; *Town of Rosedale v. Hanner, 390.*

**PARENT AND CHILD**—*Habeas corpus* by parent to procure possession of child, see EVIDENCE, 9; *Berkshire v. Caley, 1.*

*Custody of Child—Guardian and Ward.—Habeas Corpus.*—The rule of common law recognized by §2682 Burns 1894 giving the father the *prima facie* right to the custody of his minor child is not absolute, but is secondary and subordinate to the welfare and happiness of the child.  
*Berkshire v. Caley, 1.*

**PARTIES**—Joinder of all persons related to the controversy, see PLEADING, 1; *Demarest v. Holdeman, 467.*

Action by receiver of bank against directors, see PLEADING, 4, 5;  
*Coddington v. Canaday, 243.*

On appeal, see APPEAL AND ERROR, 10-12; *Smith v. Fairfield, 491.*

Substitution of parties on appeal, see OFFICERS, 1; *Schrader v. State, ex. rel., 341.*

**PATENTS**—Action to recover royalty, see **CONTRACTS**, 1, and **EVIDENCE**, 8; *Ralya v. Atkins & Co.*, 331.

**PAUPERS**—Deportation from State, see **MANDAMUS**, 8, 4; *State, ex rel., v. Overman*, 141.

**PENALTIES**—For failure to transmit telegraph message, see **TELEGRAPH COMPANIES**, 2-13; *Western Union Tel. Co. v. Ferguson*, 37; *Western Union Tel. Co. v. Henley*, 90.

For failure of officers to report fees collected cannot be recovered in action on official bond, see **OFFICERS**, 4; *State v. Flynn*, 52.

**PERSONAL INJURIES**—To passenger riding on pass, see **CARRIERS**, 1; *Payne v. Terre Haute, etc., R. Co.*, 616.

**PHYSICIAN**—As expert witness, see **OPINION EVIDENCE**; *Isenhour v. State*, 517.

**PLEADING**—Pleas in abatement and in bar, see **CRIMINAL LAW**, 4, 5, 6; *Klein v. State*, 146.

Contributory negligence in actions for personal injury or death, see **NEGLIGENCE**, 1-8; *Indianapolis St. R. Co. v. Robinson*, 232 and 414; *Southern Indiana R. Co. v. Peyton*, 690.

Conspiracy to commit a felony, see **CRIMINAL LAW**, 8; *Green v. State*, 101.

1. *Multifariousness.—Parties.—Equity.*—Where the subject of the action has become so complicated and entangled that the rights of the parties are involved in doubt, and it is difficult to determine who is liable, and who is not, except upon a full hearing in which all the persons in any way affected or interested are before the court, equity permits the joinder of all those so related to the controversy and who have a common interest in some one or more branches of it. *Demarest v. Holdeman*, 467.
2. *Railroads.—Negligence.*—A complaint in an action against a railroad company for personal injuries, charging that the injuries were inflicted by reason of "all of defendant's negligence as herein alleged," includes the negligence of the engineer charged therein. *Indianapolis Union R. Co. v. Houlihan*, 494.
3. *Banks and Banking.—Action by Receiver.*—A complaint by the receiver of a bank against the directors for damages resulting from negligence in management is not bad for want of an averment that the receiver and the parties represented by him were without fault, since if such fact was available by way of defense it should have been set up by answer. *Coddington v. Canaday*, 243.
4. *Parties.—Banks and Banking.—Receivers.—Actions ex Delicto.*—In an action by the receiver of a bank against the directors for breach of trust, it is not necessary that all of the directors be joined as defendants. *Coddington v. Canaday*, 243.
5. *Defect of Parties.—Demurrer.*—The question of defect of parties defendant is not presented by demurrer to a complaint in an action by the receiver of a bank against the directors where it was not disclosed by the complaint that there was a director not joined. *Coddington v. Canaday*, 243.
6. *Misjoinder of Causes of Action.—Harmless Error.*—Error in overruling a demurrer for a misjoinder of causes of action is harmless. *Coddington v. Canaday*, 243.

**PLEADING—Continued.**

7. *Misjoinder of Causes of Action.—Banks and Banking.—Receivers.*—A complaint by the receiver of a bank against the directors for damages for breach of trust does not contain a misjoinder of causes of action where the damages claimed are alleged to arise from breaches of trust and official duty on the part of the defendants, and all of the specifications of negligence and misconduct belong to a single class. *Coddington v. Canaday, 243.*
8. *Exhibits. — Injunction. — Taxation.*—Where the complaint, in a suit to enjoin the collection of taxes on the ground that the assessment had been reduced on appeal to the State Board of Tax Commissioners, alleged that the minutes of said board were indefinite and uncertain, and were afterward corrected, a copy of the corrected minutes filed as an exhibit cannot be considered in determining the sufficiency of the complaint, since the action was not founded upon the minutes. *First National Bank v. Greger, 479.*
9. *Demurrer.—Want of Legal Capacity to Sue.*—The want of legal capacity to sue, as a cause of demurrer under the statute, has reference to some legal disability of the plaintiff, not that the complaint upon its face fails to show a right of action in the plaintiff. *Coddington v. Canaday, 243.*
10. *Jurisdiction of Court.*—An objection that a complaint, in an action by a receiver of an insolvent corporation against the directors for damages alleged to have been sustained by the corporation by reason of the negligence of the directors, fails to show any liability on the part of the directors which a receiver can enforce goes not to the jurisdiction of the court over the subject-matter of the action, but to the sufficiency of the facts stated. *Coddington v. Canaday, 243.*
11. *Rejecting False Pleading.*—Under §885 Burns 1901, a complaint shown to be false by the answers of plaintiff to special interrogatories is properly rejected on motion. *Tilden v. Louisville, etc., Co., 532.*
12. *Answer.—Surplusage.*—Paragraphs of answer, good as general denials, not purporting to be pleas in confession and avoidance, are not rendered bad by immaterial matter alleged therein. *Ralya v. Atkins & Co., 331.*
13. *Argumentative Denial.*—An answer in denial of the material allegations of a complaint may be good, although argumentative, and where the general denial is withdrawn and the cause appealed, its merits as against demurrer must be determined by the character and materiality of its averments. *Oren v. Board, etc., 158.*
14. *Answer.—Ordinance.*—Where an ordinance is properly brought into a case by a complaint to recover a penalty for the violation thereof, such ordinance may be considered in determining the sufficiency of an answer though not set out therein. *Rowland v. City of Greencastle, 591.*
15. *Harmless Error.*—Available error can not be predicated upon the action of the court in overruling a demurrer to an answer where the record shows that at the close of the plaintiff's evidence in chief the jury, by direction of the court, returned a verdict for defendant. *Ralya v. Atkins & Co., 331.*

**PLEADING—Continued.**

16. *Abatement*.—Pleas in abatement must be certain and definite, and must anticipate and exclude all such supposable matter as would, if alleged by the opposite party, defeat his plea.  
*State v. Comer, 611.*
17. *Set-Off.—When Improper*.—Where a debtor assigned a note to plaintiff as security for a loan, such debtor is in no position to file a set-off against plaintiff's cause of action on the note, where recovery is sought from the original makers only.  
*Harris v. Randolph County Bank, 120.*
18. *Counterclaim.—Insufficiency of Cross-Complaint*.—A cross-complaint is insufficient as a counterclaim which contains no averments, or otherwise shows, that the transaction alleged therein was connected with or arose out of the same cause of action on which the plaintiff bases his complaint.  
*Harris v. Randolph County Bank, 120.*
19. *Set-Off.—When Improperly Pleaded*.—Suit was brought by a bank on a note alleged to have been received as collateral security from another bank. The latter bank was made a party defendant along with the original makers against whom judgment was demanded. *Held*, that a cross-complaint by defendant bank, alleging that plaintiff had wrongfully taken possession of the note, and converted same to its own use, sounds in tort, and cannot be pleaded as a set-off.  
*Harris v. Randolph County Bank, 120.*
20. *Motions to Strike Out*.—Available error cannot be predicated upon the action of the court in overruling a motion to strike out parts of the complaint.  
*Coddington v. Canaday, 243.*
21. *Motions.—Demurrer*.—The objection that the charge of negligence in a complaint is too general to require an answer is not raised by demurrer for want of facts. Such defect must be pointed out by motion to make more specific.  
*Coddington v. Canaday, 243.*
22. *Motion to Make More Specific.—Banks and Banking.—Receivers*.—A cause will not be reversed because of the action of the court in overruling a motion to make a complaint in an action by a receiver against the directors of a bank for damages resulting from negligent management more specific, where it appeared from the allegations of the complaint that plaintiff was unable to set out the facts more particularly for the reason that the books and records of the bank had been permitted by the defendants to be so imperfectly kept that the transactions complained of could not be more specifically described by the pleader.  
*Coddington v. Canaday, 243.*
23. *Evidence*.—Proof of either actual or constructive notice is sufficient to support an allegation, in a complaint in an action against a city for personal injuries sustained by reason of a defective culvert, "that the defendant had notice."  
*City of Indianapolis v. Tansel, 463.*

**PRACTICE—See TRIAL.**

In Supreme Court, see **APPEAL AND ERROR**, 18, 19; *Shedd v. Webb, 585*; *State v. Van Cleave, 608*.

**PROSECUTING ATTORNEY**—May perfect appeal in criminal cause, see **CRIMINAL LAW**, 32; *State v. Sopher, 360*.

**PUBLICATION**—Of city ordinance, see **MUNICIPAL CORPORATIONS**, 26; *State, ex rel., v. City of Noblesville, 31*.

Proof of publication of city ordinance, see **MUNICIPAL CORPORATIONS**, 27, 28; *Rowland v. City of Greencastle, 591*.



**PUBLIC NECESSITY**—Allowance of claim to county treasurer, see COUNTIES, 18; *Sudbury v. Board, etc.*, 446.

**RAILROADS**—See CARRIERS; MASTER AND SERVANT; NEGLIGENCE; STREET RAILROADS.

Action for death of engineer, see NEGLIGENCE, 11; *Pittsburgh, etc., R. Co. v. Martin*, 216.

Employer's liability act, see MASTER AND SERVANT, 1, 2; *Indianapolis Union R. Co., v. Houlihan*, 494.

Personal injuries, see MASTER AND SERVANT, 3; *Chestnut v. Southern Indiana R. Co.*, 509.

1. *Reporting Arrival of Trains.—Blackboard Law.—Size of Board.*—A railroad company is not liable under the penalty section of the act of 1889 as amended by the act of 1897 (Acts 1889, p. 279, Acts 1897, p. 176) for maintaining a blackboard thirty-four inches long and eighteen inches wide instead of three feet long and two feet wide for the announcement of the arrival of trains, since the penalty applies for failure to make the required report of trains, not for failure to maintain a blackboard of the dimensions specified. *State v. Cleveland, etc., R. Co.*, 288.

2. *Use of Right of Way by Foot-Passengers.*—A user of a part of a railroad right of way by the public, as a highway for foot-passengers, where such use was neither exclusive nor adverse, would not prove an implied dedication or a prescriptive right, no matter how long continued. *Cannon v. Cleveland, etc., R. Co.*, 682.

3. *Injury to Person on Track.*—A person injured while using a foot-path maintained by a railroad company along its right of way, but not dedicated to the public, cannot maintain an action for an injury caused by the company's failure to have a watchman, or its failure to operate gates or to give warning of approaching trains, since the company owes such person no duty except to refrain from wilfully injuring him. *Cannon v. Cleveland, etc., R. Co.*, 682.

4. *Negligence.—Violation of City Ordinance.—Master and Servant.*—In the trial of an action for damages for the death of an engineer caused by collision with a train which was being run at a rate of speed in violation of a city ordinance, an instruction that the ordinance was enacted for the protection of the general public in crossing or passing upon railroad tracks, and not for the benefit of railroad employes while engaged in their work, was properly refused. *Pittsburgh, etc., R. Co. v. Martin*, 216.

5. *Negligence.—Notice.—Instructions.*—In the trial of an action against a railroad company for damages for the death of an engineer of another road, caused by a collision with a train which was being run in violation of an ordinance and the usages of the tracks, an instruction that decedent was bound to use reasonable diligence for the purpose of learning whether or not defendant's trains generally ran, or were scheduled to run, over the common tracks in violation of the ordinance and usages of the tracks, and that, if by reasonable diligence he could have learned of such violation, he went upon the tracks at his peril, was properly refused.

*Pittsburgh, etc., R. Co. v. Martin*, 216.

6. *Personal Injuries.—Negligence.—Complaint.—Master and Servant.*—A complaint in an action against a railroad company for personal injuries alleged that plaintiff was employed by defend-

**RAILROADS—Continued.**

ant as a telegraph operator at a railroad crossing, and that it was his duty to keep an account and take a report of all the cars that passed in and out at the crossing over defendant's line and set the targets; that it was plaintiff's duty to go from the telegraph office, which was located about three feet from the west track, over the west track to receive reports from the outgoing trains on the east track; that while in the performance of his duty he was struck by an engine on the west track which gave no warning of its approach, and which he could not see or hear because of obstruction and noise, and that the engineer in charge of the approaching engine knew of his duty to cross the track at that time. *Held*, that although the statutory requirements as to approaching crossings did not apply, it was the duty of the engineer to exercise that diligence for plaintiff's safety, which a man of ordinary prudence would have exercised, under like circumstances, and that the complaint charged actionable negligence.

*Indianapolis Union R. Co. v. Houlihan, 494.*

7. *Fires.—Damage to Land.—Instruction.—Measure of Damages.*—No error was committed in instructing the jury in an action against a railroad company for damages to land caused by fire escaping from defendant's right of way, that the measure of damages was the difference, if any, between the market value of the land burned over, immediately before the fire, and its fair market value immediately afterward, where no other cause for depreciation was suggested by defendant in the trial of the cause.

*Chicago, etc., R. Co. v. Brown, 544.*

8. *Fires.—Damage to Personal Property.*—An instruction in an action against a railroad company for damages to property caused by fire escaping from the right of way, that the measure of damages was its fair market value at the time of its damage or destruction, was erroneous in respect to personal property that was injured only, and not totally consumed.

*Chicago, etc., R. Co. v. Brown, 544.*

**RECEIVERS**—Appointment for corporation, see **CORPORATIONS**, 6;  
*Sheridan Brick Works v. Marion Trust Co., 292.*

Action by receiver of bank against directors for damages resulting from negligence, see **PLEADING**, 3; *Coddington v. Canaday, 243.*

1. *Appointment.—Corporations.*—Plaintiff as administrator brought suit against defendant, a corporation engaged in the manufacture of brick, on certain promissory notes aggregating \$45,000 and asked for the appointment of a receiver *pendente lite*. The complaint showed that decedent and two other parties held the entire stock of the corporation and composed its directorate, decedent being the president and manager. The stockholders were unable to agree upon the selection of a president and director to fill the vacancy made by death of decedent, the works remained idle, and the company had no money to operate them or to pay its indebtedness. *Held*, that the complaint showed sufficient ground for the appointment of a receiver.

*Sheridan Brick Works v. Marion Trust Co., 292.*

2. *Banks and Banking.—Action Against Directors.*—An action may be maintained by the receiver of a bank against the directors for gross negligence resulting in waste and loss of the



**RECEIVERS—Continued.**

capital, although there are no debts and the shareholders are the only persons to whom the damages recovered could be distributed.

*Coddington v. Canaday*, 243.

3. *Corporations. — Banks and Banking.* — A complaint in an action by the receiver of a bank against the directors for damages because of negligence in management showing that the bank was a bank of discount and deposit organized under the statutes of this State; that it became insolvent, and that the receiver was appointed by the court upon the application of the Auditor of State under §2938 Burns 1901, the order of court authorizing him to bring and prosecute in his own name as such receiver all actions necessary in the discharge of his duties "whenever in the judgment of said receiver it would be proper to bring and prosecute any such proceedings or suits," that such receiver accepted the appointment, gave bond, and took the oath prescribed by law is sufficient to show the title and power of such receiver to maintain the suit.

*Coddington v. Canaday*, 243.

**REFORM SCHOOL**—Commitment, see **CRIMINAL LAW**, 37-41;  
*Lee v. McClelland*, 84.

**RELEASE**—Stipulation in railroad pass, see **CARRIERS**, 1; *Payne v. Terre Haute, etc., R. Co.*, 616.

Of transportation company from liability to sleeping car employe, see **CARRIERS**, 2, 3; *Russell v. Pittsburgh, etc., R. Co.*, 305.

**REMITTITUR**—Cure of error by, see **APPEAL AND ERROR**, 58;  
*Chicago, etc., R. Co. v. Brown*, 544.

**REPLEVIN—**

*Goods, the Sale of which Induced by Fraud.*—The seller of merchandise cannot maintain an action in replevin against the buyer thereof, on the ground that the sale was induced by fraud, without first restoring or offering to restore the amount received on account of such sale. *Adam, etc., Co. v. Stewart*, 678.

**RES GESTAE**—Conversations in arranging plans for bribery, see **CRIMINAL LAW**, 13; *Banks v. State*, 190.

Where in a prosecution for abortion the State proves part of conversation between defendant and deceased, defendant is entitled to give entire conversation, see **CRIMINAL LAW**, 23; *Diehl v. State*, 549.

**ROBBERY—**

1. *Indictment. — Assault.* — Where, in an indictment for robbery, an assault is alleged in connection therewith, it is not necessary to the sufficiency of the indictment that it also contain an allegation that the defendant "had the present ability" to commit the robbery. *Craig v. State*, 574.

2. *Indictment.*—In an indictment for robbery it is not necessary to allege an assault by the defendant on the prosecuting witness. *Craig v. State*, 574.

3. *Indictment.—Use of Word "Violently."*—An allegation in an indictment for robbery, that the articles stolen were taken "violently" is equivalent to an allegation that they were taken "by violence." *Craig v. State*, 574.

**RULES**—Of Supreme Court, see **COURTS**, 2; *State v. Van Cleave*, 608.

**SCHOOLS**—

1. *Compulsory Education.—Truancy.—Constitutional Law.—Statutes.*—The title of the act of 1899 (Acts 1899, p. 547), "An act entitled an act amending an act concerning the education of children, approved March 8, 1897, and declaring an emergency," the act defining the duties of parents and guardians concerning the attendance of children at school, providing for the appointment of a truant officer and the definition of a misdemeanor, is not violative of the provision of §19, article 4 of the Constitution, that the subject of an act shall be expressed in the title. *State v. Bailey*, 324.
2. *Compulsory Education.—Truancy.—Constitutional Law.—Statutes.*—The act of 1899 (Acts 1899, p. 547), entitled "An act entitled an act amending an act concerning the education of children, approved March 8, 1897, and declaring an emergency," indicates with sufficient precision, within the meaning of §21, article 4 of the Constitution, that it is an amendment of the act of March 8, 1897, concerning the education of children. *State v. Bailey*, 324.
3. *Compulsory Education.*—The act of 1899 (Acts 1899, p. 547), requiring every parent, guardian or other person within the State having control or charge of any child or children between the ages of six and fourteen years to send such child or children to school each year for a period not less than that of the public schools of the school corporation where the child or children reside, is not an unauthorized invasion of the natural right of the parent to the custody and control of his child. *State v. Bailey*, 324.
4. *Criminal Law.—Affidavit.—Compulsory Education.*—An affidavit charging defendant with having neglected, omitted and refused to send his child to school, in violation of the compulsory education law (Acts 1899, p. 547), is not defective because the word "unlawful" was not used therein, where the facts averred sufficiently show that the act of defendant was unlawful. *State v. Bailey*, 324.

**SEDUCTION**—Indictment, see **CRIMINAL LAW**, 1; *Hinkle v. State*, 237.

1. *Promise of Marriage by Married Man.*—In a prosecution under §2078 Burns 1894 for seduction, an instruction that if the prosecuting witness, at the time of defendant's alleged promise to marry her under which she was seduced, knew that defendant was a married man and living with his family, the jury should acquit, was proper, where there was evidence to which the instruction was applicable. *Hinkle v. State*, 237.
2. *Corroborating Evidence.—Instruction.*—Under §1876 Burns 1894, that in prosecutions for seduction "the evidence of the female must be corroborated to the extent required as to the principal witness in cases of perjury," an instruction that if the jury believed beyond a reasonable doubt that defendant had carnal and illicit intercourse with the prosecuting witness, a female of good repute for chastity, less than twenty-one years old, under promise of marriage which she had good reason to rely on, they should find defendant guilty as charged, was reversible error, since the jury might have found that all the facts on which conviction was conditioned were proved beyond a reasonable doubt by the unsupported testimony of the prosecuting witness. *Hinkle v. State*, 237.

**SET-OFF**—See PLEADING.

**SEWERS**—Enforcement of assessments, see MUNICIPAL CORPORATIONS, 13, 14; *Welch v. Town of Roanoke*, 398.

**STATUTES**—For table of statutes cited and construed, see page xxvi.  
Title of act, see COUNTIES, 10, and FOOD, 9; *Garrigus v. Board, etc.*, 103; *Isenhour v. State*, 517.

Amendment of statute as to execution of death sentence after verdict, see CRIMINAL LAW, 51, 52; *Keith v. State*, 376.

Construction of penal statute, see CRIMINAL LAW, 49; *Isenhour v. State*, 517.

Construction of statute affecting public office, see COUNTIES, 12; *Sudbury v. Board, etc.*, 446.

Repeal of appealing statute, see APPEAL AND ERROR, 8, 9; *Lake Erie, etc., R. Co. v. Watkins*, 600.

1. *Title of Act*.—It is not essential to a good title that the subject of the act shall be expressed in exact terms. It is sufficient if the subject is fairly deducible from the language employed.

*Isenhour v. State*, 517.

2. *Repeal by Implication*.—Repeals by implication are recognized only when the earlier and later acts are repugnant to, or irreconcilable with, each other. *State, ex rel., v. City of Noblesville*, 31.

3. *Repeal—Vested Rights*.—A party who institutes or defends a suit or action does not thereby acquire a vested right to a decision from a particular court or tribunal within the meaning of the provision of §243 Burns 1901, that "No rights vested, or suits instituted, under existing laws shall be affected by the repeal thereof," etc.

*Lake Erie, etc., R. Co. v. Watkins*, 600.

**STREET IMPROVEMENTS**—See MUNICIPAL CORPORATIONS.

**STREET RAILROADS**—Contract to construct railroad, see CONTRACTS, 8; *Barney v. Indiana R. Co.*, 228.

1. *Negligence—Injury of Person at Station*.—A street railroad company is not relieved from liability to a passenger for personal injury caused by a defective board in its station platform, by reason of the fact that the crowd of persons attempting to get upon the cars pushed the injured person into a place of danger and prevented her from avoiding the danger. *Indianapolis St. R. Co. v. Robinson*, 414.

2. *Personal Injury—Evidence*.—Where, in an action against a street railroad company for personal injuries sustained because of a defect in the platform, plaintiff introduced evidence to show that the crowd of people on the platform prevented the injured person from seeing the defect, it was not error to exclude the testimony of a witness offered by defendant that on Sundays during the summer of 1891 but few people returned to the city by defendant's cars, as the term "few" was too indefinite.

*Indianapolis St. R. Co. v. Robinson*, 414.

3. *Personal Injury—Evidence*.—The testimony of plaintiff's wife, in an action for injuries sustained by her by reason of a defective board in defendant's railroad platform, that the crowd of people on the platform prevented her from seeing the defect, was the statement of a fact and not a conclusion.

*Indianapolis St. R. Co. v. Robinson*, 414.

**STREET RAILROADS—Continued.**

4. *Instruction.—Negligence.—Personal Injury.*—An instruction in an action against a street railroad for personal injuries caused by a defective board in the station platform, that the injured person was guilty of negligence if she stepped into a hole in the platform, or upon a rotten board, without looking where she was stepping, or taking any precaution to ascertain the danger, was properly refused, since the situation may have been such that the woman could not have been able to see the defect.

*Indianapolis St. R. Co. v. Robinson, 414*

**TAXATION**—Suit to enjoin collection of taxes, see **INJUNCTION**, 1, and **PLEADING**, 8; *First Nat. Bank v. Greger, 479.*

1. *Equalization.—Notice to Property Owner.*—That part of §8533 Burns 1901 which provides for notice to each person the valuation of whose property the county board of review deems it necessary to increase is applicable only when the board is acting in case of individual citizens, and not to cases when the board makes orders for the purpose of equalization in certain divisions of a township under §8533 Burns 1901. *Hubbard v. Goss, 485.*
2. *Increase of Valuation by Board of Review.—Notice.*—That the valuation of each taxpayer's property within a township or division of a township may be increased by the county board of review, under §8533 Burns 1901, without notice other than that given by the law itself (§6367 Burns 1901), does not render the statute invalid as taking property without due process of law.

*Hubbard v. Goss, 485.*

**TELEGRAPH COMPANIES—**

1. *Failure to Deliver Message.—Damages.—Mental Anguish.*—An action cannot be maintained against a telegraph company for damages for mental anguish alone resulting from the negligence of the company in failing to deliver a telegraph message. *Reese v. Western Union Tel. Co., 123 Ind. 294, overruled. Jordan, J., dissents. Western Union Tel. Co. v. Ferguson, 64.*
2. *Failure to Transmit Message.—Penalty.*—In an action against a telegraph company to recover the penalty provided by §§5511, 5512 Burns 1894 for failure to transmit a message as in the statute provided it is not necessary for the plaintiff to show that he has sustained any actual damages. *Western Union Tel. Co. v. Ferguson, 37.*
3. *Failure to Transmit Message.—Aggrieved Party.*—The "aggrieved party" under §5511, 5512 Burns 1894 providing a penalty for the failure of telegraph companies to receive and transmit messages as in the statute provided is the person whose message the telegraph company has refused to receive or failed to transmit on the terms or in the manner prescribed by the statute. *Western Union Tel. Co. v. Ferguson, 37.*
4. *Failure to Transmit Message.—Nature of Telegram.—Damages.*—A telegraph message "Is stonework on building finished? Wire answer to-day. Henley Stone Company", sufficiently informed the telegraph company of the nature of the information desired to sustain a judgment against the telegraph company for the expense of sending a messenger to obtain the information requested by the telegram. *Western Union Tel. Co. v. Henley, 90.*
5. *Failure to Transmit Message.—Constitutional Law*—The statute, §§5511, 5512 Burns 1894, providing a penalty for failure to transmit telegraph messages as therein provided is not violative of §1,

**TELEGRAPH COMPANIES—Continued.**

article 14 in amendment of the federal Constitution which forbids any state to "deny to any person within its jurisdiction the equal protection of the laws," in that it applies to corporations, and not to individuals, as an individual, partnership, or corporation may own and operate a "telegraph line" and do a general business under the name of a "telegraph company."

*Western Union Tel. Co. v. Ferguson, 37.*

6. *Failure to Transmit Message.—Penalty.—Constitutional Law.*—The statute, §§5511, 5512 Burns 1894, providing a penalty recoverable by the aggrieved party for failure of a telegraph company to transmit a message in the manner prescribed by the statute is not violative of §17, article 5 of the State Constitution which gives the Governor power to grant reprieves, commutations and pardons after convictions, since such terms do not apply to the release of judgments in civil actions. *Western Union Tel. Co. v. Ferguson, 37.*

7. *Failure to Transmit Message.—Penalty.—Constitutional Law.*—The provision of §§5511, 5512 giving the aggrieved party a civil right of action against a telegraph company for a fixed penalty for the failure of such company to transmit a message in the manner prescribed by the statute is not violative of §2 of article 8 of the State Constitution in that it deprives the school fund of a proper source of revenue. *Western Union Tel. Co. v. Ferguson, 37.*

8. *Failure to Transmit Message.—Answer.—Complaint.*—A special finding, in an action to recover the penalty under §§5511, 5512 Burns 1894 for failure to transmit a message in the manner therein prescribed, that the message was not transmitted and delivered in the order of time in which it was received was not a conclusion of law, but a proper statement of fact.

*Western Union Tel. Co. v. Ferguson, 37.*

9. *Failure to Transmit Message.—Answer.—Complaint.*—In an action to recover the penalty under §§5511, 5512 Burns 1894 for failure to transmit a telegraph message in the manner prescribed therein an answer alleging diligence on the part of the defendant in attempting to deliver the message to the addressee, and the negligence of plaintiff in failing to furnish an accurate address, was no defense to an allegation in the complaint that defendant failed to "transmit the same with impartiality and in good faith, and in the order of time in which it was received."

*Western Union Tel. Co. v. Ferguson, 37.*

10. *Failure to Transmit Message.—Penalty.*—In an action under §§5511, 5512 Burns 1894, to recover the penalty for failure to transmit a message as in the statute provided, evidence that the message was received by defendant's agent at a hamlet that comprised but two houses, and at one of these, within fifty yards of defendant's office, the addressee had been living for six weeks prior to the receipt of the message, and that the agent never inquired at this house, and never delivered the message, but subsequently delivered other messages to other persons in the hamlet, warranted a finding of negligent failure to transmit the message in the order of time in which it was received, and the assessment of the penalty therefor is sustainable under the statute. *Western Union Tel. Co. v. Steele, 108 Ind. 163; Western Union Tel. Co. v. Swain, 109 Ind. 405, and Western Union Tel. Co. v. Jones, 116 Ind. 361, disapproved.*

*Western Union Tel. Co. v. Ferguson, 37.*

**TELEGRAPH COMPANIES—Continued.**

11. *Failure to Transmit Message.—Allegation as to Payment of Charges.*—Where in an action against a telegraph company for damages for failure to transmit a message plaintiff alleged that it had an arrangement and agreement with defendant whereby defendant undertook to transmit plaintiff's message, as paid, by charging the usual rate to plaintiff's account, which plaintiff paid at the end of each month, it was not necessary to allege that the account had been paid before the action was commenced.

*Western Union Tel. Co. v. Henley, 90.*

12. *Failure to Transmit Message.—Stipulation as to Repetition of Message.*—A stipulation on a telegraph blank to the effect that the company should not be liable for mistakes, delay or nondelivery of an unrepeatable message beyond the amount received for transmission is unavailable as a defense to an action for failure to transmit, where the repetition would not have prevented the default complained of.

*Western Union Tel. Co. v. Henley, 90.*

13. *Failure to Transmit Message.—Revenue Stamp.—Pleading.*—A complaint against a telegraph company for failure to transmit a message is not bad for failing to allege that a revenue stamp was attached to the message and canceled in accordance with the revenue law, where it was alleged that defendant accepted the message and undertook to deliver it, since such defense need not be anticipated in the complaint.

*Western Union Tel. Co. v. Henley, 90.*

**TOWNS—See MUNICIPAL CORPORATIONS.****TOWNSHIP TRUSTEE—**

*Road Supervisor.—Bridges.*—Section 8068 Burns 1901 makes it the duty of the township trustee to care for and manage all property belonging to the township and to superintend all the interests thereof. By §6818 Burns 1901, the road supervisor is required to carry into effect all orders of the trustee, touching highways and bridges. *Held*, that the trustee is the superior officer, and when he gives the supervisor specific directions to build a bridge or culvert, the supervisor must carry the orders of the trustee into effect.

*State, ex rel., v. Clifton, 581.*

**TREASURER**—Extra compensation to county treasurer for sale of bonds, see COUNTIES, 15; *Oren v. Board, etc., 158.*

Recovery of illegal allowances made county treasurer, see COUNTIES, 18, 14; *Sudbury v. Board, etc., 446.*

**TRIAL**—Directing verdict, see NEGLIGENCE, 18; *Menaugh v. Bedford Belt R. Co., 20.*

Instructions assuming facts to be proved, see CRIMINAL LAW, 46, 48; *Braxton v. State, 213.*

Failure of State to accord defendant a speedy trial, see CRIMINAL LAW, 8; *Klein v. State, 146.*

Refusal of trial by jury, see HABEAS CORPUS, 1; *Williams v. Hert, 211.*

Misconduct of jury, see CRIMINAL LAW, 83; *Keith v. State, 376.*



**TRIAL—Continued.**

1. *Evidence.—Railroad Rules.*—A question propounded to a witness relative to the rules or custom governing the operation of trains on a certain railroad was not objectionable on the grounds that the printed rules were the best evidence, where it was not disclosed by the evidence that any printed rules were in use, and it was shown that the rules inquired about were rules that had become established by usage. *Pittsburgh, etc., R. Co. v. Martin, 216.*
2. *Evidence.—Railroad Rules.*—In the trial of an action for damages caused by a collision, no error was committed in refusing to permit defendant railroad company to introduce in evidence a book of rules, in the absence of evidence from which the jury might have found that the offered rules were in force on the tracks where the collision occurred. *Pittsburgh, etc., R. Co. v. Martin, 216.*
3. *Evidence.—Harmless Error.*—Error in refusing to allow a witness to answer a question in a certain form is cured by a subsequent question propounded by the complaining party which elicited an answer that responded fully to the rejected question. *Chicago, etc., R. Co. v. Brown, 544.*
4. *Evidence. — Harmless Error. —* Available error cannot be predicated upon the action of the court in overruling an objection to the question, "State whether or not he was acting properly or improperly, or promptly or not promptly," the question relating to the manner in which an engineer obeyed signals, where the witness answered, "Yes, sir." *Pittsburgh, etc., R. Co. v. Martin, 216.*
5. *Evidence.—Objection.—Exception.*—In order to save an exception to the exclusion of testimony, the offer to prove must be made before the objection is sustained. *Pittsburgh, etc. R. Co. v. Martin, 216; Dunnington v. Syfers, 458; Menaugh v. Bedford Belt R. Co., 20.*
6. *Evidence.—Objection.—Exception. — Appeal and Error.*—Objections to the admission of evidence not made in the court below will not be considered on appeal. *Musser v. State, 423.*
7. *Evidence.—Objection.—Exception.— Appeal and Error.*—An objection to a question, "that it is incompetent and immaterial and too remote," is too uncertain, indefinite and general to present any question. *Musser v. State, 423.*
8. *Impeachment. — Criminal Law. — Seduction.*—Where in a prosecution for seduction defendant's wife testified that some days prior to the date of the alleged seduction she met the prosecuting witness on the street with her husband and told her that the man she was with was her husband, and that she wanted her to let him alone, and the State's attorneys asked her if she had not told a certain person that her husband had run away, leaving her without a cent, and if a certain neighbor had not brought her provisions to keep her from starving while her husband was away with prosecuting witness, the State was bound by her answers in the negative, and the matters inquired about being collateral, the witness could not be impeached thereon. *Hinkle v. State, 238.*
9. *Instructions.—Complaint.*—Where both paragraphs of a complaint stated a good cause of action it was not error for the court to instruct the jury that if plaintiff had proved by a fair preponderance of the evidence the material allegations of either paragraph of her complaint she was entitled to recover. *Southern Indiana R. Co. v. Peyton, 690.*



**TRIAL—Continued.**

10. *Instructions.*—In the trial of an action for death caused by the alleged negligence of defendant the court is not required to embody all minor and unfavorable facts, or facts in support of the defendant's theory, in its instructions, and available error cannot be predicated upon such omission, where the desired instructions were not tendered by defendant.  
*Southern Indiana R. Co. v. Peyton, 690.*
11. *Instructions.—Harmless Error.*— Available error cannot be predicated upon the refusal of the court to give certain instructions tendered by defendant, where the instructions were not signed as required by statute.  
*Musser v. State, 423.*
12. *Instructions.—Harmless Error.*— Mere verbal inaccuracies in instructions, or technical errors in the statement of abstract propositions of law, furnish no grounds for reversal, when they result in no substantial harm to defendant, if the instructions, taken as a whole, correctly state the law applicable to the facts of the case; nor is the giving of an erroneous instruction reversible error, when it appears that the substantial rights of the complaining party have not been prejudiced thereby.  
*Musser v. State, 423.*
13. *Instructions Must be Considered as an Entirety.*— Instructions are considered with reference to each other, and as an entirety, and not separately, or in dissected parts, and if the instructions as a whole correctly and fairly present the law to the jury, even if some particular instruction, or some portion of an instruction, standing alone or taken abstractly, and not explained or qualified by others, may be erroneous, it will afford no ground for reversal.  
*Musser v. State, 423.*
14. *Misconduct of Juror.—New Trial.*— Misconduct of a juror is not available as a ground for a new trial where the complaining party's counsel had knowledge thereof before verdict and made no objection thereto until after verdict was returned.  
*Ellis v. City of Hammond, 267.*
15. *Misconduct of Counsel.—Practice.*— Available error cannot be predicated upon the misconduct of counsel in the argument of the case where no objection was made at the time, and no motion was made to set aside the submission and withdraw the case from the jury.  
*Currier v. State, 114.*
16. *Directing Verdict.*— Where the evidence introduced by plaintiff wholly fails to establish any cause of action in his favor under the issues, the court may properly direct a verdict for defendant.  
*Dunnington v. Syfers, 458.*
17. *Interrogatories.—Appeal and Error.*— Available error cannot be predicated upon the action of the court in refusing to permit counsel to read to the jury interrogatories submitted under §555 Burns 1901, it appearing that the complaining party was accorded the privilege of reading the interrogatories and commenting upon them to the jury from memory.  
*Chestnut v. Southern Indiana R. Co., 509.*
18. *Interrogatories.—Verdict.*— The finding in a general verdict in an action against a city for personal injuries sustained on account of a defective culvert that defendant had constructive notice of the defect, is not affected by an answer to an interrogatory that there was no evidence as to actual notice.  
*City of Indianapolis v. Tansel, 463.*

**TRIAL—Continued.**

19. *Verdict.—Interrogatories.—Railroads.*—A telegraph operator at a railroad crossing was required to set targets and receive reports of passing trains, and while in the performance of his duties he was struck by an engine approaching from the north, and injured. The jury returned a verdict for plaintiff, and in answer to an interrogatory, found that a person standing against the east side of the target pole could see an engine coming from the north, when it got within about twenty feet. *Held*, that such answer did not overbear the general verdict where it was not found that plaintiff occupied the position named when the engine was more than twenty feet away. *Indianapolis Union R. Co. v. Houlihan*, 494.

**TRUANCY LAW**—Constitutionality of, see **SCHOOLS**, 1, 2; *State v. Bailey*, 324.

**VACCINATION**—Enforcement of order for vaccination of school children, see **HEALTH**, 1-3; *State, ex rel., v. Beil*, 25.

**VENUE**—Proof of, see **CRIMINAL LAW**, 50; *Keith v. State*, 376.

**VERDICT**—Directing verdict, see **TRIAL**, 16; *Dunnington v. Syfers*, 458.

*Answers to Interrogatories.—Presumption.*—A general verdict for plaintiff in an action for the death of a railroad engineer will not be reversed on answers to interrogatories tending to show contributory negligence on the part of deceased, where such answers may be overcome by reasonable presumptions in favor of the general verdict. *Southern Indiana R. Co. v. Peyton*, 690.

**WATERS AND WATER COURSES**—Removal of iron bridge for dredging stream, see **MANDAMUS**, 2; *State, ex rel., v. Board, etc.*, 96.

**WEAPONS—**

*Travelers.—Criminal Law.*—One going from his home by rail a distance of fifteen miles in an adjoining county to attend a political convention is not a traveler within the meaning of §2069 Burns 1901, entitling him to carry concealed weapons. To come within the exception of the statute the travel must be without the ordinary habits, business, or duties of the person, and at least such a distance from his home as takes him beyond the circle of his acquaintances, among strangers, with whose habits, conduct, and character he is not acquainted. *State v. Smith*, 241.

**WILLS**—Appeal from judgment in action to establish will, see **APPEAL AND ERROR**, 5; *Morell v. Morell*, 179.

1. *Action to Secure Probate.—Burden of Proof.*—In an action to secure the probate of an alleged will, the execution of which is denied, the burden of proof is on the plaintiff to establish its execution by a preponderance of the evidence. *Morell v. Morell*, 179.

2. *Probate.—Hearsay Evidence.*—Where it is sought to secure the probate of a will, both witnesses thereto being dead, it is improper to admit testimony as to statements made by one of the alleged witnesses in reference to the will's execution, although many years have passed, and it is impossible to procure better proof. *Morell v. Morell*, 179.

**WILLS—Continued.**

3. *Probate. — Contest. — Process.*—The general rule that an action is commenced only when the complaint is filed and process issued thereon, applies to a proceeding to contest the probate of a will, and where, in such proceeding, the persons beneficially interested under the will were not served with notice of such contest, they were entitled to have the will admitted to probate upon proof of the due execution thereof, and the contestant had no right to object. *McGeath v. Starr, 320.*
4. *Probate.—Separate Contests.—Dismissal.*—A contestant may file objections to the probate of a will during the pendency of objections filed by another party, and the dismissal by the former will not affect the proceedings of the latter. *McGeath v. Starr, 320.*
5. *Witnesses.—Wife of Beneficiary.*—Under the provisions of §§507 and 509 Burns 1894, the wife of a beneficiary of a will is not a competent witness to the execution of such will. *Belledin v. Gooley, 49.*

**WITNESSES**—Examination by grand jury, see **GRAND JURY**; *State v. Comer, 611.*

Wife of beneficiary is not a competent witness to execution of will, see **WILLS, 5**; *Belledin v. Gooley, 49.*

Physicians as expert witnesses, see **OPINION EVIDENCE**; *Isenhour v. State, 517.*

Continuance on account of absence of, see **CONTINUANCE**, *Dunnington v. Syfers, 458.*

*Self-Incrimination Before Grand Jury.*—Although a witness cannot be compelled, while before a grand jury, to testify to matters which would tend to criminate himself, yet if he does so testify without objection he will be deemed to have done so voluntarily. *State v. Comer, 611.*

**WORDS AND PHRASES**—Use of word “violently” in indictment for robbery, see **ROBBERY, 8**; *Craig v. State, 574.*

Use of word “agent” in statute fixing penalty for embezzlement, see **EMBEZZLEMENT**; *Wynegar v. State, 577.*





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